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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

LOCAL 32, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
Petitioner,

VS.

PACIFIC MARITIME ASSOCIATION, CRESCENT CITY MARINE WAYS AND DRYDOCK COMPANY, INC., AND NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN LEONARD
COUNSEL OF RECORD
1188 Franklin Street, Suite 201
San Francisco, CA 94109
Telephone: (415) 771-6400
Counsel for Petitioner
Local 32, ILWU

Of Counsel

LEONARD, CARDER & ZUCKERMAN
RICHARD S. ZUCKERMAN
San Francisco, CA

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Does a labor organization violate the National Labor Relations Act when it files contract grievances and a section 301 action in federal court for damages for breach of the work assignment provisions contained in a collective bargaining agreement?

2. Does a work assignment determination of the National Labor Relations Board insulate an employer from liability for damages for his breach of the work assignment provisions contained in a collective bargaining agreement, where his breach is voluntarily committed and not compelled by the Board's determination?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 773 F.2d 1012 and is printed in Appendix A. The Order of the Court of Appeals denying a rehearing is printed in Appendix B. The unreported Order of the District Court is printed in Appendix C. The Decision and Order of the National Labor Relations Board is reported at 271 NLRB No. 123 and is printed in Appendix D. The Decision and Determination of Dispute of the National Labor Relations Board is reported at 256 NLRB No. 24 and is printed in Appendix E.

JURISDICTION

The opinion of the Court of Appeals was filed and entered on October 7, 1985, and its Order denying petitioner's timely petition

for rehearing was filed and entered on December 10, 1985. This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

This case involves the construction and application of section 8(b)(4)(ii)(D) and section 10(k) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. § 158(b)(4)(ii)(D) and § 160(k), and section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a). These statutory provisions are printed in Appendix F.

STATEMENT OF THE CASE

Petitioner Local 32, International Longshoremen's and Warehousemen's Union, is party to the Pacific Coast Longshore Contract Document ("PCLCD"), a collective bargaining agreement between the International Longshoremen's and Warehousemen's Union and Pacific Maritime Association ("PMA"), a multi-employer collective bargaining group comprised of steamship and stevedoring companies doing business on the West Coast of the United States. For purposes relevant to the instant litigation, the PCLCD provides in section 1 that when a PMA member contracts with a shipper or ship's agent to perform stevedoring services on a vessel, the PMA member is obligated to order, from Local 32's dispatch hall, longshoremen represented by Local 32 to handle lines and to move cargo from warehouse to shipside and from shipside onto the vessel.

In early 1981, Crescent City Marine Ways and Drydock Company, Inc. ("Crescent"), a member of PMA, contracted with Weyerhaeuser Company ("Weyerhaeuser") to perform stevedoring services at Weyerhaeuser's dock facility in Everett, Washington. Crescent agreed with Weyerhaeuser that longshoremen represented by Local 32 would be ordered and employed by Crescent to move goods from shipside onto the ship. Crescent further agreed with Weyerhaeuser, however, *contrary to its agreement with Local 32*, that employees of Weyerhaeuser would be utilized to move cargo from warehouse to shipside and to handle

lines. Thereafter, Crescent engaged in the performance of stevedoring services at Weyerhaeuser's Everett dock facility under the above-described arrangement.

Pursuant to established practice under the PCLCD, Local 32 filed a grievance alleging a breach of contract by Crescent and seeking "time-in-lieu" payments as damages. Local 32 ultimately obtained a favorable arbitration award of damages from Coast Arbitrator Sam Kagel. Relying on the arbitration award, Local 32 filed additional grievances for damages under PCLCD procedures whenever a PMA member contracted with Weyerhaeuser on terms which the Coast Arbitrator had found violative of PMA's agreement with Local 32. When PMA and its members refused to honor the arbitration award and subsequent damage claims, Local 32 filed an action in federal court against PMA and Crescent, pursuant to section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), seeking to enforce the Coast Arbitrator's award of damages. Subject matter jurisdiction in the district court was conferred by section 301. The National Labor Relations Board ("NLRB" or "the Board") moved to intervene and its motion was granted by the district court.

In a related concurrent proceeding before the NLRB, triggered by the filing of a "jurisdictional dispute" unfair labor practice charge by Weyerhaeuser against Local 32, the Board conducted a hearing and later issued a work assignment determination pursuant to section 10(k) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(k). Accepting the employer's (in this case, Weyerhaeuser's) preference as between longshoremen represented by Local 32 and employees of Weyerhaeuser, the Board awarded the work of handling lines and moving cargo from warehouse to shipside at Weyerhaeuser's Everett dock facility to employees of Weyerhaeuser. Appendix E, p. A-54. When Local 32 filed damage grievances and a section 301 action to recover damages after issuance of the 10(k) determination, the Board held an unfair labor practice hearing and eventually ruled that Local 32's judicial action in seeking damages for breach of contract constituted a violation of section 8(b)(4)(ii)(D) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(ii)(D). Appendix D, p. A-36. Local 32 timely filed

a petition for review of the NLRB's order in the U.S. Court of Appeals for the Ninth Circuit. The Board cross-appealed for enforcement. Subject matter jurisdiction was conferred in the Court of Appeals under sections 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. § 160(e) and (f).

Finally, in the section 301 action, which had been ordered stayed upon motion by intervenor NLRB pending a resolution of Weyerhaeuser's unfair labor practice charge before the Board, Local 32 moved to confirm the Coast Arbitrator's award of damages and the NLRB moved to dismiss the complaint. Following a hearing, the district court issued an order granting the Board's motion to dismiss and denying Local 32's motion to confirm. While the district court found Local 32's position to be "strong and persuasive", Appendix C, p. A-21, the district court nevertheless concluded that Local 32 could not recover damages for breach of the PCLCD because, as between the 10(k) determination and the arbitrator's award, "the 10(k) determination of the NLRB must be deemed controlling", Appendix C, p. A-21.

In a consolidated appeal of the district court's order and the NLRB's unfair labor practice decision, the Court of Appeals held in No. 84-4173 that the Board's section 10(k) work assignment determination precludes Local 32 from recovering damages for breach of its collective bargaining agreement even where the employer's breach is not required by the 10(k) award. In so holding the Court of Appeals relied on the "supremacy doctrine" which, according to the panel, "bars an arbitrator from making an award inconsistent with a NLRB determination". 773 F2d. at 1016; Appendix A, p. A-6. The Court of Appeals rejected Local 32's contention that the supremacy doctrine is inapplicable where, as here, the employer's contractual breach is undertaken voluntarily and is not compelled by the Board's 10(k) determination.

In Nos. 84-7544 and 84-7646, the Court of Appeals held that Local 32 engaged in "coercive" conduct in violation of section 8(b)(4)(ii)(D) of the Act by seeking to recover damages for breach of its collective bargaining agreement with PMA. Relying on this Court's analysis in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) *(Bill Johnson's)*, a case *not* involving section 8(b)(4)(ii) of the Act, the Court of Appeals found

the requisite "coercion" because, the panel concluded, Local 32's judicial action "lacked a reasonable basis in law" and "arose from an improper motivation." 773 F.2d at 1017-1018; Appendix A, p. A-9. Apart from *Bill Johnson's, supra,* the Court of Appeals also ruled that Local 32's suit to enforce its contractual rights amounted to "coercion" under existing interpretations of section 8(b)(4)(ii) of the Act.

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case because the decision below, holding that judicial action constitutes "coercion" within the meaning of section 8(b)(4)(ii) of the Act, conflicts with decisions of other Courts of Appeals. Consistent with the legislative history of section 8(b)(4)(ii), those other circuits have held that the pursuit of judicial remedies is not "coercive" conduct within the meaning of the statute.

The writ should also be granted because the Court of Appeals has decided two important questions of federal labor law which have not been, but should be decided by this Court. As explained more fully below, the resolution of the questions presented can be expected to have a great impact on collective bargaining and the rights of workers covered by collective bargaining contracts. Thus, the decision of the Court of Appeals calls into question the ultimate validity of all collectively-bargained for work assignment provisions and precludes labor unions from seeking any redress for breach of those provisions in their contractually established grievance and arbitration procedures. This result severely undermines the federal labor policies of promoting collective bargaining agreements and encouraging resort to the peaceful dispute resolution mechanisms contained therein.

Moreover, we show below that the Court of Appeals' application of *Bill Johnson's* to the facts presented here conflicts with the relevant legislative history and important federal labor policies that were simply not implicated in *Bill Johnson's*. It is apparent, therefore, that the applicability of *Bill Johnson's,* if any, in the context of a section 8(b)(4)(ii) unfair labor practice proceeding is in need of clarification by this Court. See *SEC v. United Benefit*

Life Ins. Co. 387 U.S. 202, 207 (certiorari granted because of the importance of the issue and the need for clarifying a prior Supreme Court decision).

Finally, this case also presents a question of statutory interpretation important in the administration of the relevant statute, a further reason for granting the writ. See *NLRB v. Drivers Local Union No. 639*, 362 U.S. 274, 277 (1960); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 116 (1962).

1. The Decision of the Court of Appeals Conflicts with Decisions of Other Circuits and Is Contrary to the Legislative Purpose Underlying Section 8(b)(4)(ii)

Section 8(b)(4)(ii)(D) of the Act essentially provides that it is an unfair labor practice for a labor organization to "threaten, coerce or restrain" an employer where an object of such conduct is to force the employer to assign particular work to employees represented by that labor organization rather than to other employees. The legislative history underlying section 8(b)(4)(ii) proves convincingly that in proscribing certain "coercive" conduct, Congress distinguished between picketing, intimidation, violence and threats of picketing and violence, on the one hand, and resort to legal or judicial remedies for breach of contract on the other. Only the former were identified as abuses and were rendered unlawful by section 8(b)(4)(ii). We show below that the decision of the Court of Appeals, which holds that Local 32's judicial action in seeking to recover damages for breach of the PCLCD is itself unlawful "coercion", proscribed by section 8(b)(4)(ii), conflicts with decisions in other circuits and is contrary to the relevant legislative history.

Preliminarily, it is significant that in the precise context of a work assignment dispute, this Court has recognized that "judicial action" is not the kind of conduct which triggers the Board's jurisdiction under section 8(b)(4)(D) of the Act. Thus, in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 263-264 (1964), the Court explained as follows:

> While § 8(b)(4)(D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another [foot-

> note omitted], *the Act does not deal with the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike.* The Act and its remedies for "jurisdictional" controversies of that nature come into play *only by a strike or a threat of a strike.* (emphasis supplied.)[1]

Moreover, the Court of Appeals' finding of the requisite "coercion" under section 8(b)(4)(ii) conflicts with decisions in other circuits. Thus, in *Commerce Tankers v. National Maritime Union of America,* 553 F.2d 793 (2d Cir. 1977), *cert. denied,* 434 U.S. 923, the union sought by court action to enforce an arbitration award based on a "restraint-on-transfer" clause in its collective bargaining agreement. While the clause in question was held to violate Section 8(e) of the Act, 29 U.S.C. § 158(e), the court nevertheless dismissed the employer's claim for damages under section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, which by its terms incorporates section 8(b)(4). The court held that the union's resort to arbitration and then to court to enforce an unlawful 8(e) agreement was not a "threat, coercion or restraint under Section 8(b)(4)(ii)." *Id.,* at 802. Similarly, in *Local Union No. 48, Sheet Metal Workers International Association v. Hardy Corporation,* 332 F.2d 682 (5th Cir. 1964) *(Hardy Corp.),* the question presented was whether judicial enforcement of a restrictive subcontracting clause under section 301 was prohibited "coercion" within the meaning of section 8(b)(4)(ii) of the Act. The Fifth Circuit reviewed the relevant legislative history and concluded that "coerce" within the meaning of the statute does not encompass judicial action. Rather, the court held that "coerce" in section 8(b)(4)(ii) "means no more than *non-judicial* acts of a compelling or restraining nature . . . ". 332 F.2d at 686, emphasis supplied. See also, *Mishara Constr. Co., Inc. v. IBEW, Local 284,* 554 F.2d 488, 492 (1st Cir. 1977) (court rejects claim that union "coerced" an employer by bringing

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[1] In *Carey v. Westinghouse Electric Corp., supra,* the Court held that a union could compel an employer by court action to arbitrate a work assignment dispute pursuant to the terms of a collective bargaining agreement, even where only one of two unions had moved to compel arbitration and the resulting arbitration award might not put an end to the dispute.

charges before a grievance committee to enforce a collective bargaining agreement; such conduct, the court stated, "would have to be viewed as an acceptable first step before judicial remedies are invoked."); *Carrier Air Conditioning Co. v. NLRB,* 547 F.2d 1178, 1191 and n.15 (2d Cir. 1976), *cert. denied,* 431 U.S. 974 (1977) ("Resort to the courts for enforcement of a contract provision, while undoubtedly a somewhat coercive act, [citing *Hardy Corp., supra*] does not, to be sure, constitute the sort of coercion that Congress intended to make unlawful."); *Local 644, United Brotherhood of Carpenters v. NLRB,* 533 F.2d 1136, 1145 (D.C.Cir. 1975) (section 8(b)(4)'s "coercion" does not prevent attempted judicial enforcement of clauses in collective bargaining agreements).

The Court of Appeals acknowledged, 773 F.2d at 1018-1019; Appendix A, pp.A-10-11, the long line of cases which hold that judicial action is *not* "coercive" within the meaning of section 8(b)(4)(ii), but attempted to distinguish the instant case because of the existence here of an NLRB 10(k) determination. The Court of Appeals failed, however, to explain how the existence of a 10(k) award may change the definition of "coerce" within the meaning of section 8(b)(4)(ii). The decision of the Court of Appeals gives "the word 'coerce' in effect two meanings, since identical acts would be legal in some circumstances and illegal in others, with the determination of legality made after the fact in relation to another statute." *Carrier Air Conditioning Co. v. NLRB,* 547 F.2d at 1191, n.15. Such a result is untenable, and the Court of Appeals' purported distinction of the instant case is unsound. As we now proceed to show, given the clear legislative intent that judicial action falls outside the scope of the statutory provision, the Court of Appeals erroneously failed to apply here the principle developed in other circuits that judicial action is not "coercive" under section 8(b)(4)(ii).

The Court of Appeals' finding of a section 8(b)(4)(ii)(A) violation is based principally on *Bill Johnson's, supra,* a case not involving section 8(b)(4)(ii) of the Act. In *Bill Johnson's* an employee filed an unfair labor practice charge alleging that her employer filed a state court civil suit against her in retaliation for her "protected activities" and because she had filed charges under

the Act. The Board determined that the employer's prosecution of the civil suit violated section 8(a)(1). This Court vacated the Board's decision and remanded the case. The Court held, in the context of a section 8(a)(1) allegation, that the NLRB may not enjoin the prosecution of a *state court* lawsuit, even if filed for an allegedly retaliatory motive, unless the suit "lacks a reasonable basis in fact or law." 461 U.S. at 748.

The Court of Appeals acknowledged that "*Bill Johnson's* only involved a section 8(a)(1) retaliatory lawsuit", but reasoned that the language of *Bill Johnson's* was "sufficiently broad", to extend beyond the section 8(a)(1) context, 773 F.2d at 1015; Appendix A, p. A-4.[2] Yet, in applying the *Bill Johnson's* rationale to the facts of this case the Court of Appeals inexplicably failed even to mention the relevant legislative history. We submit that the legislative history cannot properly be so ignored. As this Court has observed, "coerce" is a "nonspecific, indeed vague" word, and it is necessary to look to the legislative history to determine precisely the kind of abuses which Congress intended to reach. See *NLRB v. Drivers Local Union No. 639*, 362 U.S. at 290.[3] This is especially true here because "Congress has been rather specific

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[2] In support, the Court of Appeals cited, 773 F.2d at 1015; Appendix A, P. A-4, *Sheet Metal-Workers International Assn., Local No. 355 v. NLRB*, 716 F.2d 1249 (9th Cir. 1983) where the court applied *Bill Johnson's* in the context of Section 8(b)(1) of the Act to a state court suit filed by a union. While section 8(b)(1) is the union-unfair labor practice counterpart to section 8(a)(1), which covers employer violations, the panel cited no case where *Bill Johnson's* has been applied in a section 8(b)(4)(ii) context. This Court should grant the writ to consider the applicability of *Bill Johnson's* in this context.

[3] In *NLRB v. Drivers Local No. 639, supra*, the Court held that a union's peaceful picketing of an employer to compel recognition of the union as the employees' bargaining representative did not violate section 8(b)(1)(A) of the NLRA, which makes it an unfair labor practice for a labor organization to "restrain or coerce" employees in the exercise of their self-organizational rights. The Court held that section 8(b)(1)(A) only empowers the Board "to proceed against union tactics involving *violence, intimidation* and *reprisal* or threats thereof . . . ". 362 U.S. at 290, emphasis supplied.

when it has come to outlaw particular economic weapons on the part of unions." *NLRB v. Insurance Agents' International,* 361 U.S. 477, 478 (1960).

Unlike section 8(a)(1), which was enacted in 1935 as part of the original Wagner Act, section 8(b)(4)(ii) was enacted in 1959 as part of the Landrum-Griffin amendments to the secondary boycott provisions of the amended NLRA. The purpose of the amendment was to close a loophole in the then-existing law under section 8(b)(4) which permitted a labor organization to coerce or threaten a secondary (neutral) employer, and thus to achieve a "secondary boycott" which the Congress had outlawed in the Taft-Hartley amendments to the NLRA in 1947. See *NLRB v. Servette, Inc.,* 377 U.S. 46, 53-54 (1964) and *NLRB v. Vegetable Packers & Warehousemen Local 760,* 377 U.S. 58, 64-66 (1964) (*Tree Fruits*) for a discussion of the congressional purpose underlying the secondary boycott amendments.[4]

The legislative history reveals that in enacting section 8(b)(4)(ii) the Congress sought to put an end to specific conduct—picketing, violence and threats of the same—directed against neutral employers which the Taft-Hartley amendments, as interpreted by the Board and the courts, did not proscribe. See *NLRB v. Servette,* 377 U.S. at 53-54. This kind of conduct was identified again and again in the McClellan committee hearings and is referred to repeatedly in the legislative history.

For example, in testifying in support of the Administration's bill which included Section 8(b)(4)(ii) and was supported by Senators Goldwater and Dirksen (II Legislative History of the Labor Management Reporting and Disclosure Act of 1959, pp. 975-976, 987), the Secretary of Labor cited several examples of

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[4] In *Tree Fruits, supra,* this Court considered the legislative history of the Landrum-Griffin amendments and held that peaceful secondary picketing of retail stores limited to appeals to customers not to buy products of certain firms did not "threaten, coerce, or restrain" within the meaning of Section 8(b)(4)(ii). The Court explained that "it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." 377 U.S. at 72.

what he termed "coercion" on the part of unions to illustrate the type of conduct the Administration's proposals were designed to eliminate. The Secretary stated:

> The McClellan committee hearings contain numerous incidents of blackmail *picketing* where certain unions by the use of *violence* and *intimidation* have *coerced*, or attempted to *coerce*, employers to deal with them in violation of the representation rights of employees. . . . An employer who held out despite the picketing met with incidents such as a fire bomb tossed into his store, sugar poured into truck gas tanks, and personal assaults.
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> * * * * *
>
> Much of *this kind* of *coercion* occurred in connection with organizational activities. In many of these cases there was blackmail *picketing* or *threats of* blackmail *picketing*. In other instances the *coercion* was for the purpose of forcing a person to cease doing business with a nonunion employer. II Legis.Hist. at p. 993 (emphasis supplied).

The Secretary concluded his remarks on this issue by stating that "[u]nder the Administration's proposal [that is, section 8(b)(4)(ii)] the secondary boycott provisions would be broadened and strengthened to make unlawful *the type of activity . . . [he had just] described*". *Id.*, at 994 (emphasis supplied). The Secretary never suggested that such "activity" included judicial action by a union to recover damages for breach of a collective bargaining agreement.

Other examples of "coercion" mentioned in the legislative history similarly refer to picketing and threats to engage in strikes and picketing. Senator Goldwater, one of the leading proponents of the secondary boycott amendements which became law, explained the reasoning underlying his support for section 8(b)(4)(ii) thusly:

> *Threats* of a *strike* or *picketing* made directly to an employer can be as effective as the strike or the picketing itself. In this way an employer may be *coerced* . . . . II Legis.Hist. at p. 1079 (empahasis supplied).

Moreover, there is nothing in the legislative history which demonstrates *any* Congressional concern with proscribing or limiting "judicial action" as a means of closing the loopholes revealed in the secondary boycott law. Indeed, in a memorandum submitted to the Senate at the time President Eisenhower signed the 1959 labor reform act, Senator Goldwater analyzed the new law and specifically distinguished between coercion within the meaning of section 8(b)(4)(ii) and judicial action:

> Thus, although employers and unions . . . may lawfully enter into such agreements, *and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint—economic or otherwise—may be used* by any party to such agreement . . . . II Legis.Hist. at p. 858 (emphasis supplied).[5]

In sum, by relying on *Bill Johnson's* to find Local 32's judicial action to be "coercive" and therefore proscribed by section 8(b)(4)(ii), the Court of Appeals has reached a result which is contrary to the intent of Congress. See *Hardy Corp.*, 332 F.2d at 686 (court analyzes legislative history and holds that "coerce" in the statute "means no more than *non-judicial* acts of a compelling or restraining nature. . . "; emphasis supplied).

2. Application of the Supremacy Doctrine Herein Undermines the Federal Labor Policy of Assuring that Collective Bargaining Agreements Will Be Honored

"The underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process." *Carey*

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[5] While this language dealt with section 8(e), 29 U.S.C., 158(e), agreements in the construction industry, the general collective bargaining contract principles expressed apply equally here. Senator Goldwater's statements clearly reflect an intention to differentiate between "coercion" and "judicial action", and his remarks carry great weight. As this Court has observed, "[i]t is the sponsors that we look to when the meaning of statutory words is in doubt." *Tree Fruits*, 377 U.S. at 66. In *Hardy Corp.*, 332 F.2d at 686-687, the court relied on Senator Goldwater's statements to hold that a union's "resort to the courts" was not prohibited coercion within the meaning of section 8(b)(4)(ii).

v. Westinghouse Electric Corp., 375 U.S. at 265. The "supremacy doctrine", which favors an NLRB determination over an inconsistent arbitration award, has no applicability here because PMA members can fulfill their contractual obligations to Local 32 without at the same time violating the Board's 10(k) determination. In these circumstances, the decision of the Court of Appeals in refusing to enforce the Coast Arbitrator's award of damages contravenes the "underlying objective" of the federal labor laws.

The Board's affirmative 10(k) award requires only that employees of Weyerhaeuser be assigned the work of moving cargo from warehouse to shipside and handling lines at Weyerhaeuser's Everett dock facility. Appendix E, p. A-54. The 10(k) award does not require members of PMA to act, or refrain from acting in any manner. Rather, it is the freely chosen decision of a PMA member to contract to perform stevedoring services at the Everett dock which results in a breach of the PCLCD. The 10(k) determination simply does not compel PMA members to contract with Weyerhaeuser. Thus, PMA members are free to refuse, consistent with the Board's 10(k) award, to enter into arrangements whereby employees of Weyerhaeuser perform longshoring tasks reserved by the PCLCD to employees represented by Local 32. By acting accordingly, PMA members can fulfill their contractual obligations without, in any way, contravening the Board's 10(k) determination.

It is thus apparent that the Coast Arbitrator's award of damages is not inconsistent with the Board's work assignment determination. The 10(k) award does not require PMA members to violate the PCLCD. If members of PMA freely choose to deal with Weyerhaeuser in a manner which results in a breach of the PCLCD, longshoremen represented by Local 32 should be entitled to damages for the breach. That is all Local 32 is seeking, and nothing in the Board's 10(k) award prohibits this.

In this regard the Court of Appeals erroneously failed to follow *Associated General Contractors of America, Inc. v. I.U.O.E., Local 701*, 529 F.2d 1395 (9th Cir.) *cert. denied*, 429 U.S. 822 (1976) (*AGC*). In *AGC* the court held that a union had the right to recover damages from its own employers for a breach of its collective bargaining contract despite an NLRB 10(k) award

"assigning" the work in dispute to the employees of another company. This was true even though the damage action was based on a board of adjustment's determination "that the disputed work was to be performed" by the Operating Engineers (Local 701) and the NLRB had awarded the same work to the Teamsters. 529 F.2d at 1396. The *AGC* panel perceptively found there was no conflict between the Board's work assignment and the employer's obligation to pay damages for the breach of its contract because the breach was undertaken voluntarily and was not compelled by the Board's 10(k) award. *Id.* at 1398. Thus, the employer "could simply refuse to subcontract [its] pump operation to companies which had agreed to hire only Teamsters"; by doing so, the employer would fulfill its obligation to Local 701 without at the same time violating the NLRB's order. *Id.* As explained above, the same is true here. PMA members may refuse to enter into business arrangements which result in a breach of section 1 of the PCLCD without at the same time violating the 10(k) award.[6]

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[6] The Court of Appeals attempted to distinguish *AGC* on two grounds, neither of which, we submit, withstands scrutiny. First, the Court of Appeals reasoned (773 F.2d at 1017; Appendix A, p.A-8) that the party who owed the contractual duty to the union (Local 701) in *AGC* had "complete control over the decision whether to hire a Local 701 subcontractor." But that is precisely the case here. PMA members have "complete control" over whether to perform services for Weyerhaeuser in a manner which will require them to violate their collective bargaining agreement. The panel also reasoned (773 F.2d at 1017; Appendix A p.A-8) that in the instant case the 10(k) award is "unconditional" whereas in *AGC* it was not. Yet, in each case, the Board determined that certain employees are entitled to perform the work in dispute. As between the Operating Engineers and the Teamsters, the Board awarded the work to the Teamsters. As between Local 32 and employees of Weyerhaeuser, the Board awarded the work to employees of Weyerhaeuser. Both awards, therefore, are "unconditional" to that extent. Both awards are also "conditional" to the extent they do not control potential future situations involving rival claims by *other* unions. Hence, we cannot fathom the Court of Appeals' purported distinctions and submit that *AGC* should have been followed as controlling precedent.

Because the 10(k) award does not require PMA members to violate the PCLCD, the Court of Appeals erroneously invoked the supremacy doctrine to permit Crescent to escape its contractual obligation to pay damages for the breach.[7] This result is unwarranted because Crescent created its *own* dilemma by binding itself voluntarily to two conflicting agreements: one with Local 32 that the requirements set forth in section 1 of the PCLCD would be honored; another with Weyerhaeuser to provide stevedoring services under terms which caused Crescent to violate section 1. Crescent must now be required to abide by the consequences of its choices.[8]

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[7] Compare the cases relied on by the Court of Appeals in support of its application of the supremacy doctrine, 773 F.2d at 1016; Appendix A, pp.A-6-7. These cases, uniformly, involve a *single employer* caught between the demands of competing unions, each having a contractual claim with the employer to the disputed work. In these "single employer" cases the employer could not adhere to the 10(k) award without at the same time violating its collective bargaining agreement with one of the competing unions. The fallacy in the rationale of the Court of Appeals is that it treats the instant case as if it *also* presents a single employer situation. However, as demonstrated above, unlike in the single employer cases, members of PMA are free to live up to their obligations embodied in the PCLCD without at the same time engaging in conduct contrary to the Board's 10(k) determination.

Moreover, in the "single employer" cases relied on by the Court of Appeals, the arbitration or grievance committees had ostensible authority to compel a particular work assignment by the employer involved because their decisions were rendered pursuant to a collective bargaining agreement to which the single employer was a party. In the instant case the Coast Arbitrator had no authority to bind Weyerhaeuser and his decision did not purport to do so. The Coast Arbitrator thus did not "assign" to longshoremen the actual work awarded by the NLRB to employees of Weyerhaeuser. All the Coast Arbitrator's award does is provide damages for breach of contract. For these reasons the "single employer" cases relied on by the Court of Appeals are all distinguishable and do not support the application of the supremacy doctrine here.

[8] Cf. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), where this Court enforced an arbitral award of backpay damages to employees laid off in violation of a collective bargaining agreement, even though the layoffs were made pursuant to a conciliation agreement the

The result reached by the Court of Appeals also undermines "the federal labor policy that *parties to a collecive bargaining agreement must have reasonable assurance that their contract will be honored. W.R. Grace & Co. v. Local Union 758,* 461 U.S. at 771, citing *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 509 (1962) (emphasis supplied).[9] Indeed, the decision of the Court of Appeals actually has the effect of encouraging employers to "dishonor" the work assignment provisions of their collective bargaining agreements.

Thus, the Board's record in 10(k) cases is such that "in virtually every case" (including the instant case), the Board's 10(k) award of work coincides with the employer's preference. See *NLRB v. ILWU Local 50,* 504 F.2d 1209, 1220 and authorities cited therein (9th Cir. 1974), *cert. denied,* 420 U.S. 973 (1975); Leslie, *Union Jurisdictional Disputes,* 75 Colum.L.Rev. at 1505-1506; Morris, *The Developing Labor Law* at 263 (1983). Given the Board's record it is clear that the practical effect of

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company had entered into with the EEOC and which a district court had approved. The Court reasoned that imposing liability was appropriate because the company had created its own dilemma by committing itself "voluntarily to two conflicting contractual obligations." 461 U.S. at 767; *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983) (Court refuses to allow an employer, as part of a strike settlement agreement with a labor organization, to disregard voluntary unconditional commitments made by the employer to strike replacements; as in *W.R. Grace & Co., supra,* the employer's dilemma was of its own making).

[9] This important federal labor policy has special force in the circumstances of this case. It is common knowledge in the maritime industry that longshore work opportunities have declined drastically in the last twenty-five years as a result of modernization and mechanization changes implemented by the waterfront employers. See, *NLRB v. International Longshoremen's Association, AFL-CIO, et al.,* 447 U.S. 490, 496 (1980); *California Cartage Co., Inc., et al. v. Federal Maritime Commission, et al.,* 721 F.2d 1199, 1200-1201 (9th Cir. 1983), *cert. denied,* ____ U.S. ____, 105 S.Ct.110. Thus, PMA members, who have reaped the benefits of collective bargaining agreements which allow for technological innovation and corresponding loss of jobs for longshoremen, should be compelled to honor their agreement to pay contract damages for violations of what is left of section 1 of the PCLCD.

precluding a damage suit for violations of the work assignment provisions of a collective bargaining agreement is to allow employers, with the Board's blessing, to dictate work assignment terms contrary to their collective bargaining agreements and to leave labor unions without any remedy whatsoever. This is so because under existing Board law,[10] if a non-assigned union so much as files a grievance in a work assignment dispute, employers may file section 8(b)(4)(ii)(D) unfair labor practice charges, obtain a section 10(k) hearing and be certain that the ultimate award will not only support their work assignment preference but will also shield them from having to pay damages for their contractual breach to the non-assigned union.

This result flies in the face of the federal labor policy which seeks to promote collective bargaining agreements. Further, the holding of the Court of Appeals herein

> ha[s] the effect of taking work jurisdiction questions entirely out of the market place and plac[es] them in the hands of the Board. No union [can] ever bargain successfully with an employer to have its work demands satisfied while knowing that the bargaining provision [is] ultimately unenforceable .... *One suspects that some sophisticated employers have capitulated to union work demands and a liquidated damage provision with the intent of never complying.* Leslie, *Union Jurisdictional Disputes*, 75 Colum.L.Rev. at 1486 (emphasis supplied).

In sum, the Court of Appeals' decision creates an unnecessary tension with important federal labor policies. The decision also threatens to undermine the integrity of countless collectively-bargained for work assignment provisions contained in union

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[10] See *Local Union No. 7, International Longshoremen's and Warehousemen's Union*, 273 NLRB No. 58 (1984), where the Board held that a labor union violated section 8(b)(4)(ii)(D) of the act by filing "time-in-lieu" grievances seeking damages for breach of the work assignment provisions contained in a collective bargaining agreement.

contracts.[11] This Court should grant the writ to consider fully the ramifications of the Court of Appeals' decision.

3. The Decision of the Court of Appeals Contravenes the Federal Labor Policy Embodied in Section 301

The Court of Appeals' application of the *Bill Johnson's* analysis to the instant case involving a federal court lawsuit brought under section 301 creates a conflict with the federal labor policy which underlies that statutory provision. In section 301 Congress provided federal jurisdiction over contractual disputes between employers and unions. One of the Congressional objectives in enacting section 301 "was the elimination of obstacles to suits in the federal courts" as a means of promoting stability in labor relations. *ILWU v. Juneau Spruce Corp.*, 342 U.S. 237, 242 (1952). *Accord: Bergman v. NLRB*, 577 F.2d 100, 104 (9th Cir. 1978).[12] Thus, as the Senate Report explained, in order "to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements . . . should be enforceable in the Federal courts." S.Rep.No. 105, 80th Cong. 1st Sess. 16 (1947).

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[11] The decision of the Court of Appeals totally nullifies the applicable provisions of Local 32's collective bargaining agreement. Yet, sections 10(k) and 8(b)(4)(ii)(D) of the Act do not indicate that Congress intended such a result. Significantly, in section 8(e) of the Act, 29 U.S.C. § 158(e), Congress explicitly provided that agreements containing so-called "hot cargo" clauses "shall be to such extent unenforceable and void." If Congress also intended to invalidate *completely* provisions of a collective bargaining agreement in situations involving sections 10(k) and 8(b)(4)(ii)(D), including provisions requiring the payment of contract damages, it certainly knew how and could have done so. That Congress did not is further evidence that the Court of Appeals' decision is erroneous.

[12] In *Bergman v. NLRB, supra*, the court held that a union's filing of a section 301 lawsuit to enforce its rights under a collective bargaining agreement was not an unfair labor practice under section 8(b)(3) of the Act. Local 32 discussed *Bergman* in its brief to the Ninth Circuit but the case was not addressed by the panel.

In *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1959), this Court reviewed the legislative history of Section 301(a). Relying on the Senate Report the Court "summed up" the philosophy of § 301 as follows:

> Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace. *Id.,* at 454.

This "philosophy" was reiterated by the Court three years later:

> The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless *unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements. Dowd Box Co. v. Courtney,* 368 U.S. at 509 (emphasis supplied).

While the strong policy considerations underlying section 301 are central to an analysis of the instant case, such considerations had absolutely no relevance in *Bill Johnson's* and the Court of Appeals, therefore, erroneously applied *Bill Johnson's* to the facts presented here. The ruling of the Court of Appeals that a union may commit an unfair labor practice under section 8(b)(4)(ii) merely by seeking judicial enforcement of its rights under a collective bargaining agreement is simply inconsistent with the basic principles embodied in section 301. As this Court has explained,

> 'Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of law and not the National Labor Relations Board.' *Textile Workers Union v. Lincoln Mills,* 353 U.S. at

452, quoting H.R.Conf.Rep. No. 510, 80th Cong., 1st Sess. 42 (1947).[13]

4. The Decision of the Court of Appeals Is Contrary to the Federal Labor Policy of Encouraging the Peaceful Settlement of Disputes through the Use of Contractual Grievance Procedures

In holding unlawful a labor union's conduct in filing "time-in-lieu" grievances to preserve for its members a damage remedy for violations of a collective bargaining agreement, the Court of Appeals' decision flatly contradicts the established federal labor policy of encouraging the peaceful resolution of disputes through contractual grievance-arbitration procedures.[14] Thus, Local 32's conduct in following the agreed-upon method for raising and resolving disputes arising under the PCLCD is precisely the kind of action Congress sought to encourage in the Labor-Management Relations Act of 1947, to promote industrial peace and stability. Section 203(d) of that Act, 29 U.S.C. § 173(d), provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . .".

Moreover, consistent with this explicit Congressional policy, this Court has repeatedly demonstrated its commitment to protecting the integrity of the grievance-arbitration process estab-

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[13] Under the decision of the Court of Appeals Congress *sub silento* amended section 301 in 1959 to make the filing of a § 301 action an unfair labor practice in some circumstances, proscribed by section 8(b)(4)(ii). In *Hardy Corp., supra,* the Fifth Circuit noted that "it would have been unusual for Congress to have amended § 301(a) of the Act" in this manner. 332 F.2d at 687. The court relied on this consideration in holding that judicial enforcement under section 301 is not "coercive" within the meaning of section 8(b)(4)(ii). The Court of Appeals should have done the same and refused to enforce the NLRB's order.

[14] This federal labor policy had no relevance in *Bill Johnson's.* This is another reason why the Court of Appeals erred in applying the *Bill Johnson's* analysis to the facts of this case.

lished by the parties in collective bargaining. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (doubts regarding whether a grievance is subject to arbitration under a collective bargaining agreement should be resolved in favor of arbitrability); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (it is not for the courts to determine the merits of an arbitrable grievance; "[t]he federal labor policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits . . ."); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960) (in a suit to compel arbitration, courts are not to weigh the merits of the grievance in determining arbitrability; that question is for the arbitrator); *W.R. Grace & Co. v. Local Union 759, supra,* (Court enforces arbitral award of backpay to laid off employees even though layoffs were made pursuant to an EEOC conciliation agreement approved by a district court). As this Court explained in *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962): "The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace."

The Court of Appeals' decision has the clear effect of *discouraging* labor unions from resorting to established grievance procedures to settle peacefully their contract disputes with employers. The decision also leaves labor unions without *any* arbitral or judicial remedies for violations of the work assignment provisions of their collective bargaining agreements. Such results are inconsistent with the entire scheme of the federal labor laws.

CONCLUSION

The decision sought to be reviewed allows employers voluntarily to breach work assignment provisions of a collective bargaining agreement and yet escape paying damages for the breach as required by the agreement. The decision below also allows the NLRB to condemn as an unfair labor practice and enjoin the conduct of a labor organization which involves nothing more than the filing of contract grievances and a federal court lawsuit to recover damages for breach of a collective bargaining agreement. In reaching these results the court below misapplied the "supremacy doctrine" and a prior Supreme Court decision, and decided important questions of federal law in a manner which conflicts with decisions of other Courts of Appeals, the relevant legislative history and important national labor policies. The writ of certiorari should therefore be granted.

San Francisco, California

Dated: March 5, 1984

Respectfully submitted,

NORMAN LEONARD
Counsel of Record
Counsel for Petitioner
Local 32, ILWU

LEONARD, CARDER &
ZUCKERMAN

RICHARD S. ZUCKERMAN
Of Counsel

(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

CA No. 84-4173
DC No. CV 81-1483V

International Longshoremen's and
Warehousemen's Union, Local 32,
Plaintiff-Appellant

vs.

Pacific Maritime Association and
Crescent City Marine Ways and Drydock Company, Inc.,
Defendants-Appellees,

and

National Labor Relations Board,
Intervenor Appellee.

CA No. 84-7544
DC No. 81-1483V

Local 32, International Longshoremen's
and Warehousemen's Union,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

CA No. 84-7646
NLRB No. 19 CD 377

National Labor Relations Board,
Cross-Petitioner,

vs.

Local 32, International Longshoremen's
and Warehousemen's Union,
Cross-Respondent.

[Filed Oct. 7, 1985]

OPINION

Appeal from the United States District Court
for the Western District of Washington
Honorable Donald S. Voorhees, District Judge, Presiding
On Petition to Review an Order of
the National Labor Relations Board
Argued and Submitted June 24, 1985—Seattle, Washington

Before: WALLACE, FARRIS, and HALL, Circuit Judges

FARRIS, Circuit Judge:

In No. 84-7544, Local 32 seeks review of the NLRB's order that the union cease its attempts to enforce an arbitrator's award. The arbitrator had awarded "time-in-lieu" payments against Jones Washington and Crescent City for work which the NLRB had already assigned to non-Local 32 workers. In No. 84-7646, the NLRB cross-applies for enforcement of its work assignment order, reported at 271 N.L.R.B. No. 123 (1984). In No. 84-4173, the union appeals the decision of the United States District Court for the Western District of Washington, which denied Local 32's motion to confirm the arbitration award.

Local 32 and the Pacific Maritime Association, an employer group, agreed that PMA members would employ exclusively Local 32 workers to perform certain longshoring activities. Two members of PMA, Crescent City and Jones Washington, were subsequently hired by Weyerhaeuser to move goods from shipside onto ships berthed at Weyerhaeuser's dock facility in Everett, Washington. The remainder of longshoring work, including handling lines and moving goods from warehouse to shipside, was performed by Weyerhaeuser's own employees—who were members not of Local 32, but of the Association of Western Pulp and Paper Workers.

About December 12, 1980, Weyerharuser closed its Thermo-Mechanical Mill adjacent to the Everett dock. Local 32 claimed that upon the closing of the Mill, the union's contract with Jones Washington and Crescent City required the companies to order Local 32 members to perform the longshoring tasks previously performed by Weyerhaeuser's AWPPW workers. To press its

claim, on December 21 local 32 engaged in a 45-minute work stoppage at the dock.

The resulting work dispute between Local 32 and AWPPW became the subject of both NLRB and arbitration proceedings. On December 29, Weyerhaeuser filed a charge with the NLRB, alleging that Local 32 had committed an unfair labor practice in violation of section 8(b)(4)(ii)(D) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(D). The charge alleged that Local 32 had illegally engaged in a "secondary" work stoppage which, while directed immediately at Jones Washington, had the underlying purpose of forcing Weyerhaeuser to assign the AWPPW's longshoring activities to Local 32 workers. The NLRB awarded the disputed work to the AWPPW in a proceeding under section 10(k) of the NLRA, 29 U.S.C. § 160(k), and after Local 32 agreed to comply, the NLRB dismissed Weyerhaeuser's unfair labor practice charges.

Concurrent with these proceedings, the same dispute was moving through the grievance-arbitration mechanism provided for by the collective bargaining agreement between Local 32, Crescent City, and Jones Washington. An arbitration hearing was held prior to the NLRB's section 10(k) decision, but it was not until four months *after* the NLRB's section 10(k) decision that the arbitrator ruled that Local 32 employees should have been ordered to perform the AWPPW's stevedoring tasks. The arbitrator awarded local 32 "time-in-lieu" payments for the work done by AWPPW, as damages for Crescent City and Jones Washington's alleged breach of their collective bargaining agreements.

Local 32 sought enforcement of the arbitration award by filing "payment-in-lieu" grievance claims and bringing suit under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). The district court denied enforcement of the arbitration award, finding that it conflicted with the NLRB's prior section 10(k) decision.

Reacting to the union's section 301 suit to enforce the conflicting arbitration award, the NLRB reinstated Weyerhaeuser's unfair labor practice charge on October 23, 1981, and determined that Local 32's filing of "payment-in-lieu" claims and a section

301 suit constituted 1) a failure to comply with the Board's section 10(k) decision, and 2) a section 8(b)(4)(ii)(D) unfair labor practice in itself. Local 32 timely files a petition for review of the NLRB's decision and appeals the district court's refusal to confirm the arbitration award. The NLRB's cross-application for enforcement was consolidated in this appeal. We have jurisdiction under 29 U.S.C. § 160(e), (f).

The issue in Nos. 84-7544 and 84-7646 is whether a union's attempt to enforce an arbitration award which is inconsistent with a prior section 10(k) proceeding constitutes 1) an unfair labor practice under section 8(b)(4)(ii)(D) of the NLRA, or 2) a failure to comply with the Board's section 10(k) determination. Our resolution of this issue is dispositive of Local 32's appeal in No. 84-4173.

I. *Finding an unfair labor practice under* Bill Johnson's Restaurants.

A. *Applying the* Bill Johnson's *test.*

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Supreme Court held that an employer's prosecution of a retaliatory suit against picketing employees constitutes an unfair labor practice under section 8(a)(1) if the suit 1) is filed with an improper motive and 2) lacks a reasonable basis in law. *Id.* at 744; *see Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2811 (1984). Although *Bill Johnson's* only involved a section 8(a)(1) retaliatory lawsuit, its language was sufficiently broad, *see* 461 U.S. at 744 ("the prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the Act that may be enjoined by the Board"), that the few decisions thus far applying *Bill Johnson's* have extended the holding beyond the section 8(a)(1) context. *See Local No. 355, Sheet Metal Workers' International Association v. NLRB*, 716 F.2d 1249, 1258-64 (9th Cir. 1983) (applying *Bill Johnson's* to a section 8(b)(1) retaliatory suit brought by a union); *Local 1115, Nursing Home and Hospital Employees Union and Smithtown General Hospital*, 275 N.L.R.B. No. 45 at 9 (April 26, 1985) (applying *Bill Johnson's* to find that union violated section 8(b)(1)(A) by seeking to confirm arbitrator's award). We therefore employ *Bill*

Johnson's improper motivation/reasonable basis test to determine whether the union committed a section 8(b)(4) unfair labor practice in seeking to enforce the arbitrator's award.

The Board held that the union's bringing of payment-in-lieu grievances and its filing of a section 301 suit to enforce the arbitrator's decision were "improperly motivated," 461 U.S. at 744, by a desire to circumvent the Board's section 10(k) decision and obtain the proceeds of work which the union was not entitled to perform. The Board further held that the second prong of *Bill Johnson's* was satisfied: the union's suit lacks a "reasonable basis" because the Board's section 10(k) determination precludes the arbitrator's contrary award of in-lieu payments. We must uphold these legal conclusions unless they are arbitrary and capricious. *NLRB v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 741*, 704 F.2d 1164, 1166 (9th Cir. 1983).

B. Improper motivation—circumventing the section 10(k) determination.

The Board's finding of an improper desire to circumvent the section 10(k) determination is not arbitrary and capricious. The union's attempt to obtain payment for work to which it is not entitled would, if successful, completely undermine the section 10(k) work assignment. *See International Association of Bridge, Structural & Ornamental Ironworkers, Local 395 v. Lake County, Indiana Council of the United Brotherhood of Carpenters et al.*, 347 F. Supp. 1377, 1382-84 (N.D. Ind. 1972) (barring union's section 301 claim and rejecting union's argument that its agreement to comply with section 10(k) decision only meant that it would refrain from forcing employer to assign work); *see also Pepper Construction Co. v. International Union of Operating Engineers, Local 150*, 749 F.2d 1242, 1247 (7th Cir. 1984) (union's agreement to disclaim work disputed in section 10(k) proceeding will bar union from seeking any back pay for the work assignment); *Capenter's Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1279 (9th Cir. 1984) (refusing to allow "a variance in the employer's obligations under the labor agreement merely because the abitrator's decision arises in the context of a section 301 proceeding instead of a Board proceeding"), *cert. denied*, 105

S. Ct. 2018 (1985); *Chauffeurs and Helpers Local Union No. 50 v. McCartin-McAuliffe Mechanical Contractor, Inc.*, 708 F.2d 313, 315 (7th Cir. 1983) (union's acceptance of settlement of work dispute prior to conclusion of section 10(k) hearing bars union from enforcing contrary arbitrator's award). We therefore focus on the second prong of *Bill Johnson's*: does the union's suit have a "reasonable basis"?

C. Lack of reasonable basis—the supremancy doctrine.

1. General principles.

It is well-established that the "supremacy doctrine" bars an arbitrator from making an award inconsistent with a NLRB determination. *See e.g., Local Joint Executive Board v. Royal Center, Inc.*, 754 F.2d 835 (9th Cir. 1985); *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1278 (9th Cir. 1984); *see also Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S., 249, 262 (1974); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964).

In the precise context where a section 10(k) determination conflicts with an arbitrator's work assignment award, the Fifth and Sixth Circuits have held that the Board's section 10(k) determination must take precedence over a section 301 suit seeking to enforce an arbitrator's contrary award. *See International Union of Operating Engineers, Local No. 714 v. Sullivan Transfer, Inc.*, 650 F.2d 669, 676-77 (5th Cir. 1981); *U.A.W. v. Rockwell International Corp.*, 619 F.2d 580, 582-83 (6th Cir. 1980); *New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755, 767 (5th Cir. 1966); *see also Pepper Construction Co.*, 749 F.2d at 1247; *cf. Associated General Contrators, Inc. v. International Union of Operating Engineers, Local 701*, 529 F.2d 1395, 1397-98 (9th Cir.), *cert. denied*, 429 U.S. 822 (1976) (section 301 contract action not precluded by section 10(k) ruling where former not inconsistent with latter); *Associated General Contractors of Massachusetts, Inc. v. Boston District Council of Carpenters*, 599 F. Supp. 1560, 1561-62 (D. Mass. 1985) (same).

The circuit courts' interest in finality of the Boards' determinations and their refusal to "permit the rights and obligations of the

parties to vary with the forum," *Carpenters' Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 513 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 335 (1983), *cited in Carpenters' Local Union No. 1478*, 743 F.2d at 1279, have been echoed by the district courts that have considered situations analogous to the instant case and given precedence to the Board's section 10(k) decision. *See International Association of Bridge, Structural and Ornamental Ironworkers*, 347 F. Supp. at 1381-83; *Dock Loaders & Unloaders of Freight Cars & Barges, Local 854 v. W.L. Richeson & Sons, Inc.*, 280 F. Supp. 402, 404-05 (E.D. La. 1968).

2. *Associated General Contractors* is distinguishable.

Local 32 argues, however, that the supremacy doctrine is inapplicable here because the arbitrator's award does not conflict with the NLRB's section 10(k) decision. Local 32 contends that the instant case is controlled by *Associated General Contractors of America, Inc. v. I.U.O.E., Local 701*, 529 F.2d 1395 (9th Cir.), *cert. denied*, 429 U.S. 822 (1976) *(AGC)*, in which an arbitrator's award was held not to conflict with an NLRB section 10(k) decision.

In *AGC*, Local 701 and AGC, an employer group, agreed that AGC members would only hire subcontractors who employed Local 701 workers to operate concrete pumps. A member of AGC hired Pump-Con, even though Pump-Con had already contracted to employ only Teamsters to operate the pumps. In the resulting work dispute between Local 701 and the Teamsters, an arbitrator awarded the work to Local 701 members. The NLRB subsequently awarded the same work to the Teamsters. Local 701 then sought a declaratory injunction to bar AGC members from subcontracting their concrete pump operations to companies which had already made exclusive employment agreements with the Teamsters.

We recognized that in many cases a "judgment in favor of the union which lost before the NLRB could place the employer 'between the devil and the deep blue.' " *See AGC*, 529 F.2d at 1397 (citation omitted). But we found that the arbitrator's award to Local 701 did *not* necessarily conflict with the NLRB's work assignment, since AGC members could simply refuse to subcon-

tract their pump operations to companies which had agreed to hire only Teamsters. By doing so, AGC members "would fulfill their contractual obligations to Local 701 under the Collective Bargaining Agreement without at the same time violating the N.L.R.B. order." *Id.* at 1398.

This line of reasoning is unavailable in the instant case. The party who owed the contractual duty to the union in *AGC* was also the primary employer—wielding complete control over the decision whether to hire a Local 701 subcontractor. In contrast, neither Jones Washington nor Crescent City can compel Weyerhaeuser to assign all longshoring activities to themselves or to Local 32 members; it is Weyerhaeuser which holds the power to hire and fire, and Weyerhaeuser has no contractual obligations to Local 32. To allow Local 32 to pressure either Jones Washington or Crescent City to pressure Weyerhaeuser could be to allow the union to exert "secondary" pressure, potentially an unfair labor practice under section 8(b)(4)(ii) of the NLRA.

A second key difference between the instant case and *AGC* is that here the section 10(k) work assignment is unconditional. The Board's order states that "Employees of Weyerhaeuser Company, who are represented by Association of Western Pulp and Paper Workers, Local 10, are entitled to perform the work of handling of cargo from the warehouse or last point of rest to shipside and the tying up and casting off of lines." This unqualified assignment of work would conflict with *any* attempt by any of the parties invoved to assign the stated work to members of Local 32.

In contrast, the NLRB order in *AGC* covered "all situations in which members of the [subcontractors' association which had contracted with the Teamsters] performed concrete pumping work for AGC contractors." *AGC*, 529 F.2d at 1396, *citing Joint Council of Teamsters No. 37*, 205 N.L.R.B. 383, 386 (1973). The NLRB order thus did not prohibit work from being assigned to a *non*-member of the subcontractors' association—which was the very recourse that we recommended to avoid any potential conflict between the NLRB work assignment and the arbitrator's award. *See* 529 F.2d at 1397-98.

We therefore conclude that *AGC* is distinguishable and that the arbitrator's award here conflicts with the NLRB's section 10(k) assignment of work to the AWPPW.[1]

Because the union is barred by the supremacy doctrine from enforcing the arbitrator's award, there is no "reasonable basis in law" for its grievance and section 301 claims. *Bill Johnson's*, 461 U.S. at 744. Because the union's suit also arose from an improper motivation—to circumvent the section 10(k) decision—under *Bill Johnson's* its suit amounts to an unfair labor practice. The Board's finding of an unfair labor practice is not arbitrary and capricious.

II. *The Board's finding is supported by existing interpretations of section 8(b)(4)(ii).*

A. Interpretations of coercion.

Apart from *Bill Johnson's*, our previous interpretations of section 8(b)(4)(ii) support the Board's finding. Section 8(b)(4)(ii)(D) of the NLRA makes it an unfair labor practice

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[1] We have held that an NLRB decision will not be given preclusive effect if it did not "fully compl[y] with the standards of procedural and substantive due process that attend a valid judgment by a court . . . ." *Edna Pagel, Inc. v. Teamsters Local Union No. 595*, 667 F.2d 1275, 1280 (9th Cir. 1982), (quoting *Paramount Transportation Systems v. Teamsters Local 150*, 436 F.2d 1064, 1066 (9th Cir. 1971)). However, we need not address the res judicata effect of a section 10(k) determination in order to resolve the issues before us today. Even if we were to conclude that a section 10(k) determination is not entitled to res judicata effect under the *Edna Pagel* standard, we would still apply the supremacy analysis outlined above to give the section 10(k) determination precedence over the contrary arbitration award. *See International Union of Operating Engineers, Local No. 714 v. Sullivan Transfer, Inc.* 650 F.2d 669, 677 (5th Cir. 1981) (finding that section 10(k) determination was not an administrative determination entitled to res judicata effect, but still relying on congressional policy favoring expeditious resolution of work assignment disputes to conclude that a "nonprevailing union cannot recover damages from an employer or another union to the extent that such a recovery would be repugnant to an N.L.R.B. section 10(k) determination.")

for a union to "threaten, coerce, or restrain any person" with the objective of "forcing or requiring any employer to assign particular work to employees in a particular labor organization." 29 U.S.C. §158(b)(4)(ii)(D). We have interpreted the scope of section 8(b)(4)(ii) pragmatically, looking to the "coercive nature of the conduct, whether it be picketing or otherwise," *NLRB v. International Brotherhood of Electrical Workers,* 405 F.2d 159, 162 (9th Cir. 1968) (quoting *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760,* 377 U.S. 58, 68 (1964)), *cert. denied,* 395 U.S. 921 (1967), and finding an unfair labor practice when there is "proof which if viewed realistically tends to show" a coercive effect. 405 F.2d at 162. *See Associated General Contractors of California, Inc. v. NLRB,* 514 F.2d 433, 438-39 (9th Cir. 1975) ("coerce" was intended to "reach any form of economic pressure of a compelling or restraining nature").

Under this standard, we have held that a union may not enforce an arbitrator's award of in-lieu payments when the effect is to encourage a neutral employer to pressure the primary employer to hire union employees. *Id.* at 436, 438. Similarly, we have found that "the mere filing of" a retaliatory lawsuit by a union against its own members may amount to "coercion" under section 8(b)(1)(A), even if the suit is prosecuted in good faith or would be barred on the merits by res judicata. *United Stanford Employees, Local 680 v. NLRB,* 601 F.2d 980, 983 (9th Cir. 1979); *see Sheet Metal Workers,* 716 F.2d at 1261 (noting "the attendant monetary cost, anxiety, and loss of time," associated with defending against a retaliatory lawsuit, and finding that bringing a bad-faith action amounts to coercion under section 8(b)(1)(a)). Our holding that the union's section 301 suit against Jones Washington amounts to secondary coercion of Weyerhaeuser is consistent with our established view of the meaning of "coercion."

B. Suits to enforce contractual rights.

We are aware that several circuit court and NLRB decisions have held that section 8(b)(4)'s "coercion" bar does *not* prevent a union from bringing a lawsuit to enforce its contractual rights. *See Carrier Air Conditioning Co. v. NLRB,* 547 F.2d 1178, 1191 & n.15 (2d Cir. 1976), *cert. denied,* 431 U.S. 974 (1977); *Local 644, United Brotherhood of Carpenters v. NLRB,* 533 F.2d 1136,

1145 (D.C. Cir. 1975); *Acco Construction Equipment, Inc. v. NLRB,* 511 F.2d 848, 852 (9th Cir. 1975); *Local Union No. 48 of Sheet Metal Workers, International Association v. Hardy Corp.,* 332 F.2d 682, 686 (5th Cir. 1964); *Bay Counties District Council of Carpenters,* 265 N.L.R.B. 646, 650 n.10 (1982); *National Association of Broadcast Employees and Technicians and Metromedia,* 255 N.L.R.B. 372, 374 (1981), *petition dism'd (mem.) sub nom. Metromedia, Inc. v. NLRB, 676 F.2d 711 9th Cir. 1982); Laborers' International Union of North America, Local 89 and Sullivan & Associates,* 230 N.L.R.B. 638, 638-39 (1977).

In none of these cases, however, would the enforcement of the union's contract in court have resulted in a conflict with an existing section 10 (k) Board determination. Thus, these decisions were never required to resolve the conflict between the policy of encouraging dispute resolution through the courts and the countervailing labor policy considerations of the supremacy doctrine. Instead these decisions dealt with "arguably meritorious" claims that had not been precluded by a contrary NLRB determination, *see National Association of Broadcast Employees,* 255 N.L.R.B. at 374; *Laborers' International Union,* 230 N.L.R.B. at 639. Furthermore, when the union's "use of the contractual grievance procedure in connection with its demand for payment of lost wages amounted to 'thinly disguise[d] clearly coercive tactics,' the NLRB has found section 8(b)(4) coercion to be present. *Brotherhood of Teamsters & Auto Truck Drivers Local 85,* 224 N.L.R.B. 801, 807-08 (1976), *quoting Southern California Pipe Trades District Council 16,* 207 N.L.R.B. 698, 700 (1973); *see Local Union No. 7, International Longshoremen's and Warehousemen's Union,* 273 N.L.R.B. No. 58 at 12 (Dec. 14, 1983) (finding section 8(b)(4)(ii)(D) violation when longshoremen's union sought to enforce arbitrator's award of time-in-lieu payments against company which had no direct control over work assignment and section 10(k) decision had already assigned work to AWPPW).

We therefore uphold the NLRB's finding of a section 8(b)(4)(ii)(D) violation. Because the section 10(k) order expressly requires the union to refrain from using "means proscribed

by Section 8(b)(4)(D)," the Board's finding of noncompliance is also affirmed.

III. *The district court's refusal to confirm the arbitration award.*

In granting the NLRB's motion to dismiss in No. 84-4173, the district court considered evidentiary matters beyond Local 32's complaint, including affidavits and exhibits. Accordingly, we view the district court's judgment as one of summary judgment under Fed. R. Civ. P. 56, *see Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1032, n.1 (9th Cir. 1983), and examine *de novo* whether no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. *Id.* at 1033; *Garrett v. Lehman*, 751 F.2d 997, 999 n.1 (9th Cir. 1985).

In light of our preceding discussion of the supremacy doctrine, *see supra*, section I-C, we must uphold the district court's refusal to confirm an arbitration award which conflicts with an NLRB section 10(k) work assignment. Local 32 argues, however, that the applicable state statute of limitations precludes Crescent City and the NLRB from even raising the "supremacy doctrine" as a defense.

Several decisions in this and other circuits have held that a party's failure to petition to vacate an arbitration award within the relevant statutory limitations period will preclude the assertion of affirmative defenses in a subsequent action to confirm the award. *See, e.g. Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2nd Cir. 1984); *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Celotex Corp.*, 708 F.2d 488, 490 (9th Cir. 1983); *Sheet Metal Worker's International Association, Local No. 252 v. Standard Sheet Metal, Inc.*, 699 F.2d 481, 483 (9th Cir. 1983); *Service Employees International Union, Local No. 36 v. Office Center Services, Inc.*, 670 F.2d 404, 412 (3d Cir. 1982); *Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 v. Jefferson Trucking Co.*, 628 F.2d 1023, 1025-27 (7th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981). The relevant limitations period for any attempt by Crescent City to vacate the arbitrator's award is the three-month period prescribed by Washington state law. *See Sheet Metal Workers*, 699 F.2d at 483 n.2; *San Diego*

County District Council of Carpenters v. Cory, 685 F.2d 1137, 1140-42 (9th Cir. 1982); Wash. Rev. Code Ann. § 7.04.180 (West 1961). Because the arbitrator issued his award on September 16, 1981, the applicable limitations period for vacating the award expired on December 16, 1981—two days before Local 32's complaint was filed in the district court. Local 32 therefore concludes that neither Crescent City nor the NLRB—which was alerted to Local 32's intent to enforce the arbitration award by early October, 1981 and did not intervene until March, 1982—may now raise the supremacy doctrine as a defense in this action.

Although we have held that "[o]rdinarily, a party opposing an arbitration award must move to vacate the award or be barred from further legal action," *Sheet Metal Workers*, 699 F.2d at 482, neither we nor the other circuits have applied this rule when the award, if enforced, would undermine a contrary section 10(k) NLRB work assignment. We decline to apply this rule to either the NLRB or Crescent City.

At the outset, we note that the rule by its own terms is limited to a "party" to the arbitration. *See id.* The NLRB was not a party to the arbitration. Nor has the rule been applied in the past against the NLRB, which acts not merely as a private party but as the primary determiner and enforcer of federal labor policy.

More importantly, Congress intended to make the section 10(k) proceeding the "peaceful and binding" final determination of a disputed work assignment, *see NLRB v. Radio and Television Broadcast Engineers Union, Local 1212*, 364 U.S. 573, 580 (1961) (quoting 93 Cong. Rec. 136 (1947)); *see also Carey*, 375 U.S. at 272. This intention would be undermined if the section 10(k) decision stood or fell by a private party's failure to move to vacate a contrary arbitration award within the state limitations period. "If this newly granted Board power to hear and determine jurisdictional disputes had meant no more than that, Congress certainly would have achieved very little to solve the knotty problem of wasteful work stoppages due to such disputes." 364 U.S. at 580. Similarly, if the NLRB were barred from enforcing its section 10(k) decision simply because it failed to intervene after a contrary arbitration award had been issued, the Board

would be required to monitor or intervene in every private arbitration suit that falls within the scope of a section 10(k) award. There is no evidence that Congress contemplated this burden when it enacted section 10(k) and made it preeminent over any arbitrator's decision.

Finally, in *Carey* the Supreme Court stated in dicta that the NLRB's superior section 10(k) authority could be invoked "at any time." *Carey*, 375 U.S. at 272. Following *Carey*, the Fifth and Sixth Circuits have held that a section 10(k) determination made subsequent to an arbitration award will effectively void the preceding award. *See Rockwell International*, 619 F.2d at 583 (section 10(k) takes precedence over arbitration award "regardless of which action was initiated first"); *New Orleans Typographical Union*, 368 F.2d at 767; *Dock Loaders and Unloaders*, 280 F. Supp. at 404; *see also International Union of Operating Engineers, Local No. 714 v. Sullivan Transfer, Inc.*, 650 F.2d 669, 677 (5th Cir. 1981). If we were now to enforce the three-month bar against the NLRB and Crescent City, an anomalous situation would result; a prior section 10(k) determination would become ineffective simply because the Board or a party failed to timely move to vacate a subsequent arbitration award, whereas a subsequent section 10(k) proceeding would automatically vacate a previous arbitration award, without any action by the loser of the arbitration. Such a situation would encourage the NLRB to delay its section 10(k) proceeding until after an arbitration award has been issued, so as to ensure that the section 10(k) proceeding is ultimately given precedence. Apart from its duplicative effect, this delay would thwart Congress' intent in enacting section 10(k) to expeditiously "try to get jurisdictional disputes settled," *Radio Engineers*, 364 U.S. at 579. *See also Service Employees*, 670 F.2d at 412 (recognizing that federal policy favoring expedient resolution of labor disputes underlies the arbitration mechanism and statute of limitations scheme); *Jefferson Trucking*, 628 F.2d at 1027 (same).

We therefore hold that the failure to move to vacate an arbitration award within the applicable limitations period does not preclude a prior or subsequent section 10(k) decision from invalidating a contrary arbitration award. "The power of the

federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes . . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 83-84 (1982) (quoting *Hurd v. Hodge,* 334 U.S. 24, 34-35 (1948) (footnotes omitted)). *See also I.U.B.A.C. Local Union No. 31 v. Anastasi Brothers Corp.,* 600 F. Supp. 92, 94 (S.D. Fla. 1984) (employers did not waive their claim that contract upon which arbitration award was based was illegal when they failed to move timely to vacate award).

Because the Washington statute of limitations does not bar Crescent City or the NLRB from raising the supremacy doctrine, the district court's refusal to confirm the arbitration award is affirmed.

IV. *Conclusion.*

The policies underlying the supremacy doctrine, as enunciated by the Supreme Court in *Carey* and the overwhelming body of circuit and district court decisions, indicate that a section 10(k) decision must be given precedence over an arbitrator's contrary decision. These same policies prevent a private party's failure to timely move to vacate an arbitration award from foreclosing the subsequent use of the supremacy doctrine to overturn the award.

Because Local 32 is barred by the supremacy doctrine from enforcing the arbitrator's award, there can be no "reasonable basis in law" for its grievance and section 301 suits. *Bill Johnson's,* 461 U.S. at 744. The union's suit also arose from an "improper motivation" to circumvent the section 10(k) decision; hence, under *Bill Johnson's* the suit amounts to an unfair labor practice. This result is supported by our interpretation of "coercion" under section 8(b)(4) of the NLRA, and is not barred by decisions interpreting "coercion" in other contexts.

We therefore affirm the Board's finding that Local 32 committed an unfair labor practice and failed to comply with the Board's section 10(k) decision; grant the Board's application for enforcement of its section 10(k) decision; and affirm the district court's refusal to confirm the arbitration award.

No. 84-4173: AFFIRMED.

No. 84-7544: AFFIRMED.

No. 84-7646: ENFORCEMENT GRANTED.

Appendix B

United States Court of Appeals
For the Ninth Circuit

CA No. 84-4173
DC No. CV 81-1483V
(Western Washington)

International Longshoremen's and
Warehousemen's Union, Local 32,
Plaintiff-Appellant

vs.

Pacific Maritime Association and
Crescent City Marine Ways and Drydock Company, Inc.,
Defendants-Appellees,

and

National Labor Relations Board,
Intervenor Appellee.

CA No. 84-7544
DC No. 81-1483V

Local 32, International Longshoremen's
and Warehousemen's Union,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

CA No. 84-7646
NLRB No. 19 CD 377

National Labor Relations Board,
Cross-Petitioner,

vs.

Local 32, International Longshoremen's
and Warehousemen's Union,
Cross-Respondent.

[Filed Dec. 10, 1985]

ORDER

Before: WALLACE, FARRIS, and HALL, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix C

United States District Court
Western District of Washington

No. C81-1483V

International Longshoremen's and Warehousemen's Union, Local 32,

Plaintiff,

vs.

Pacific Maritime Association and Crescent City Marine Ways and Drydock Company, Inc.,

Defendants.

and

National Labor Relations Board,

Intervenor.

[Filed Sept. 14, 1984]

ORDER

Having considered the motion of plaintiff for an order confirming and enforcing arbitration award, the motion of defendant Crescent City Marine Ways and Drydock Company, Inc., to dismiss for lack of jurisdiction and the motion of intervenor National Labor Relations Board to dismiss complaint or for summary judgment, together with the written submissions and oral argument of counsel, the court now finds and rules as follows:

1. This litigation stemmed out of a controversy between plaintiff Local 32 of the International Longshoremen's and Warehousemen's Union (hereinafter "Local 32") and Local 10 of the Association of Western Pulp and Paper Workers (hereinafter "Local 10") to do certain work on a private dock owned by the Weyerhaeuser Company in Everett, Washington.

2. That work was assigned by Weyerhaeuser to members of Local 10. Members of Local 32 then engaged in a work stoppage at that dock to protest Weyerhauser's assignment of the work to Local 10.

3. The dispute was referred to the joint Coast Labor Relations Committee of the Pacific Maritime Association. That committee failed to reach agreement.

4. Weyerhaeuser then filed with the NLRB an unfair labor practice charge against Local 32. Thereafter a 10(k) hearing was held, and the NLRB ruled that Local 10 was entitled to perform the work in dispute.

5. Thereafter, however, Coast Arbitrator Sam Kagel ruled that, under the agreement between defendants and the ILWU, the work in dispute should have been assigned to members of Local 32 and that "time-in-lieu" payments should in consequence be paid by defendants to the members of Local 32. Because of the arbitrator's favorable decision, Local 32 advised the NLRB that it intended to take all appropriate legal action to enforce the right of its members to "time-in-lieu" payments. The NLRB then issued a complaint on an unfair labor practice charge. In that complaint the NLRB charged that, in seeking to enforce "time-in-lieu" claims, Local 32 failed to comply with the Board's 10(k) determination. That unfair labor practice charge was decided adversely to Local 32 by Administrative Law Judge James S. Jenson. He found that Local 32's pursuit of the "time-in-lieu" payments amounted to an unfair labor practice in violation of Section 8(b)(4)(ii)(D) of the Labor Management Relations Act.

6. At the time of oral argument we were advised by counsel that the NLRB had very recently affirmed the decision of Administrative Law Judge James S. Jenson.

7. This Court is now faced with the question as to whether the award of "time-in-lieu" payments made by Coast Arbitrator Kagel should be enforced in this action or whether the 10(k) determination of the NLRB requires the dismissal of this action.

8. There is concededly a strong policy in favor of sustaining an award of an arbitrator. There is, however, also a strong policy

in favor of sustaining those decisions made by the NLRB within its jurisdiction.

9. Counsel for plaintiff argues that there is no real conflict here because defendant Crescent could simply have advised Weyerhaeuser that it could not perform the work in question because it was compelled by the Pacific Maritime Association contract with the ILWU to employ Local 32 members. Defendants argue that there is in fact a conflict and that the 10(k) ruling of the NLRB must prevail.

10. Although there are strong and persuasive arguments on both sides, the Court is of the opinion that there is in fact a conflict between the arbitrator's award and the 10(k) determination and that, as between the two, the 10(k) determination of the NLRB must be deemed controlling.

11. Because of the determination by the NLRB that the work in question was properly allocated to members of Local 10, plaintiff cannot recover "time-in-lieu" payments from defendants.

Accordingly, the motion of Local 32 of the ILWU to confirm and enforce arbitration award is DENIED. The motion of Intervenor NLRB to dismiss complaint is GRANTED, and the complaint of plaintiff is DISMISSED WITH PREDUDICE.

The clerk will enter final judgment to reflect the Court's rulings.

The Clerk of this Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 14th day of September, 1984.

Donald S. Voorhees
United States District Judge

Appendix D

United States of America
Before the National Labor Relations Board

271 NLRB No. 123
Case 19—CD—377

Local 32, International Lonshoremen's and Warehousemen's Union

and

Weyerhaeuser Company

and

Association of Western Pulp and Paper Workers, Local 10

DECISION AND ORDER

On 30 July 1982 Administrative Law Judge James S. Jenson issued the attached decision. The Respondent filed exceptions and a supporting brief and a Motion For a Stay of Proceedings.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We deny the Respondent's Motion for a Stay of Proceedings. In its motion, the Respondent argues that the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB,* 113 LRRM 2647, 97 LC ¶ 10,130 (1983), compels the Board to stay the instant proceedings until such time as the courts resolve the Respondent's Section 301 suit seeking "time-in-lieu" payments pursuant to an arbitration award favorable to the Respondent. We disagree.

As the judge found, the Respondent's actions constitute both an unlawful effort to undermine the Board's Section 10(k)

award,[1] which was contrary to the Respondent's interests, as well as prohibited economic coercion of Jones-Washington Stevedoring Company and the Pacific Maritime Association with an object of forcing Weyerhaeuser to assign the disputed work to its members. See *Teamsters Local 85 (PMA)*, 224 NLRB 801 (1976). It is also well established that the Board's Section 10(k) awards take precedence over any and all contrary arbitration awards. *Carey v. Westinghouse*, 375 U.S. 261 (1964). Accordingly, we find that the Respondent's Section 301 action, which seeks to enforce an arbitration award contrary to the Board's Section 10(k) award and also seeks to achieve a prohibited objective, lacks a reasonable basis in fact and law. Therefore, the Court's decision in *Bill Johnson's* does not require a stay of proceedings.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge and orders that the Respondent, Local 32, International Longshoremen's and Warehousemen's Union, Everett, Washington, its officers, agents, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. 31 July 1984

Don A. Zimmerman, Member

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[1] 256 NLRB 167 (1981).

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Case No. 19-CD-377

Local 32, International Longshoremen's and Warehousemen's Union

and

Weyerhaeuser Company

and

Association of Western Pulp and Paper Workers, Local 10
Interested Party.

Daniel R. Sanders, Atty.,
of Seattle, WA, for the General Counsel.
Richard Zuckerman, Atty.,
of San Francisco, CA, for the Respondent.
Dean E. Peterson, Atty.,
of Tacoma, WA, for the Charging Party.

DECISION

Statement of the Case

James S. Jenson, Administrative Law Judge: This case was heard in Seattle, Washington, on January 19, 1982. The complaint, which was amended on December 7, 1981,[1] and at the hearing, issued on October 26 pursuant to a charge filed on December 29, 1980.[2] The complaint, as amended, alleges, in substance, noncompliance with the Board's 10(k) award by

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[1] All dates are in 1981 unless stated otherwise.

[2] The charge was initially dismissed on June 19, 1981, following the Board's Decision and Determination of Dispute which issued on May 27 (256 NLRB No. 24) and the Respondent's notice to the Acting Regional Director that it intended to comply therewith. On October 23, the dismissal was revoked in accordance with the Region's determina-

attempting to enforce "time-in-lieu" claims for work being performed in compliance with said award. Respondent denies it has engaged in conduct in contravention of the Board's 10(k) determination. All parties were afforded full opportunity to appear, to introduce evidence and to examine and cross-examine witnesses. Briefs were filed by the General Counsel, the Respondent and Charging Party, all of which have been carefully considered.

Upon the entire record in the case, including the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

Findings of Fact

I. Jurisdiction

It is admitted and found that Weyerhaeuser Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

It is admitted and found that the Respondent and the Association of Western Pulp and Paper Workers, Local 10, are each labor organizations within the meaning of Section 2(5) of the Act.

III. Issue

Whether, by seeking to enforce "time-in-lieu" claims provided for in its collective-bargaining agreement with Jones-Washington Stevedoring Company, Respondent has failed to comply with the Board's 10(k) determination in 256 NLRB No. 24.

IV. The Alleged Unfair Labor Practices

A. The 10(k) Determination

Weyerhaeuser, an integrated forest products company, owns and operates several private docks used to transport its own and other manufacturers' products. This matter involves its dock

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tion that Respondent had engaged in conduct inconsistent with its notice of intent to comply.

located at Everett, Washington. The Everett dock has been in existence since 1902. From 1936 until 1975, Weyerhaeuser operated the Sulphite Mill adjacent to the Everett dock. In 1975, it ceased operation of the Sulphite Mill and commenced operation of the Thermo-Mechanical Mill, herein TM Mill, also located adjacent to the Everett dock. In addition to goods produced at the TM Mill and a nearby mill, since at least 1977, the goods exported across the Everett dock have included pulp from Kamloops, British Columbia; pulp from Casmopolis, Washington; lumber from its Mills "E" and "B"; and plywood from its Snoqualmie, Washington, mill. The foregoing goods are transported by truck to the Everett dock where they are unloaded and "highpiled" in warehouses adjacent to the dock. When a ship arrives at the Everett dock, employees of Weyerhaeuser tie the ship to the dock, prepare the goods in the warehouse for loading in accordance with a "plan," and transport it onto the dock to shipside by forklift operators. Employees involved in ship tie-up and bringing goods from the warehouse to shipside (as well as casting off the ship's tie-up lines) are Weyerhaeuser's employees represented by Association of Western Pulp and Paper Workers, herein called AWPPW. Once the goods have been placed at shipside, the cargo is hooked to the ship's gear and lifted by crane into the hold of the ship by employees of Jones-Washington Stevedoring Company, herein called Jones, who are represented by Respondent. Jones maintains a contract with Weyerhaeuser by which Jones is paid its incurred expenses, including wages and other compensation of its employees, as well as a "management fee" calculated on a "cost-plus" basis. Jones is a member of the Pacific Maritime Association, herein called PMA, an employer association comprised of various stevedoring and shipping companies. PMA and Respondent are parties to a collective-bargaining agreement entitled "Pacific Coast Longshore Contract Document," herein called PCLCD, which establishes, *inter alia,* wages and other compensation levels for employees of PMA member employers, including Jones. These wage and compensation levels are paid to Jones by Weyerhaeuser as part of their cost-plus contract arrangement. Weyerhaeuser is not a member of PMA and is not a signatory to the PCLCD. Thus, at all relevant times, work at the Everett dock was performed as follows: the tying up

and casting off of ships at the dock, and the work of moving goods from the warehouse to shipside was performed by employees of Weyerhaeuser represented by AWPPW.

In the latter part of 1980, Weyerhaeuser decided to close the TM Mill located adjacent to the Everett dock, thereby eliminating manufacturing work at that facility. It was determined, however, that cargo dock work at the Everett dock would continue as before. Accordingly, on or about December 12, 1980, the TM Mill ceased manufacturing operations. The dock operations continued unabated as stockpiled goods from the TM Mill and goods from other facilities continued to be exported across the Everett dock. Work at the dock continued in the same manner as before the TM Mill closing, with employees of Weyerhaeuser represented by AWPPW continuing to tie up and cast off vessels and move goods from their last place of rest to shipside with the use of forklifts. Jones' employees represented by Respondent continued to move goods from shipside onto the vessel.

On December 21, 1980, employees represented by Respodent engaged in a 45-minute work stoppage at the Everett dock to protest Weyerhaeuser's assignment of the work in dispute—the handling of cargo from the warehouse or last point of rest to shipside, and the tying and untying of lines of vessels docked at the Everett dock—to employees represented by AWPPW, rather than to employees represented by Respondent. An Area Arbitrator under the grievance-arbitration provisions in the PCLCD was present. He referred the dispute to the Joint Coast Labor Relations Committee, which failed to reach agreement. On April 2, 1981, a hearing was held before Coast Arbitrator Sam Kagel, whose decision, under the PCLCD, is "final and conclusive." As noted heretofore, Weyerhaeuser is not a party to such agreement.

On December 29, 1980, Weyerhaeuser filed the instant charge. A Section 10(k) hearing was held on January 19, 1981, and on May 27, 1981, the Board issued a Decison and Determination of Dispute[3], wherein it determined that employees of Weyerhaeuser, who are represented by AWPPW, are entitled to perform the

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[3] 256 NLRB No. 24.

work of the handling of cargo from the warehouse or last point of rest to shipside and the tying up and casting off lines of vessels at Weyerhaeuser's dock at Everett, Washington. The Board also determined that Respondent was not entitled by means proscribed by Section 8(b)(4)(D) to force or require Weyerhaeuser to assign the disputed work to employees represented by that labor organization.

By telegram dated June 8, 1981, Respondent's attorney advised the Board's regional office that Respondent intended to comply with the Board's Decision and Determination of Dispute. In reliance on this representation, the charge was dismissed on June 19, 1981.

B. The Arbitration Award

On September 16, 1981, Coast Arbitrator Kagel issued his Opinion and Decision (which is final and binding as between Respondent and PMA) that Respondent's claim that the work in dispute should have been assigned to Respondent's members and that Respondent's claim for "time-in-lieu" payments under the PCLCD was sustained. Kagel found that the controlling factor was the fact that when the TM Mill ceased operations, the TM Dock was no longer an "industrial dock" as defined in the PCLCD; that it "... in effect, became a commercial dock although privately owned, and ... that other exceptions under the PCLCD ..." were not applicable.[4]

On October 9, 1981, two of the Respondent's representatives on the Joint Labor Relations Committee talked to Kenneth Engleson, Jones' manager at the Port of Everett, whose office is located across the street from the Union's dispatch hall. According to Engleson, he was asked "... whether we were going to order labor for the dock and whether we were going to abide by the Kagel award." Engleson responded that "... we were going to order labor as directed by Weyerhaeuser and that was the only way we could go under the circumstances." According to Engleson, one of the men replied, "I don't know what's going to

[4] Weyerhaeuser was not a party to the arbitration.

happen."[5] Paragraph 9 of the complaint alleges the Respondent advised "that there would be problems" if Jones didn't abide by the Kagel decision. Acknowledging that "this type of remark is not an out and out threat of a job action . . . ", the General Counsel contends "The remark could have been reasonably interpreted as indicating the possibility of trouble, i.e., work stoppages, if the appropriate labor was not ordered." Engleson testified that the Mossman Star was diverted from Everett to Vancouver, and then changed back, but that he didn't recall why. Thus, there is no evidence to show the diversion to Vancouver was related to any remarks made by Respondent's representatives. I do not agree that the remark made to Engleson can reasonably be interpreted as the General Counsel contends and recommend dismissal of paragraph 9.

The following day, October 10, a special meeting of the Labor Relations Committee was held in the Jones' offices. Representatives of Jones, the PMA, and Respondent attended. One of the Respondent's business agents asked a Jones official if that company was going to abide by the ruling set forth in the Kagel award. According to Engleson, his immediate superior, Dan Harlan, responded that, "at that particular time there had been a ruling by the National Labor Relations Board awarding the work to Weyerhaeuser employees. He was well aware of the Kagel award and so he was right in between knowing full well that we had to take our instructions from Weyerhaeuser and we couldn't very well move either one way or the other without violating existing situations." According to Engleson, Respondent's representatives contended that Jones "should be abiding by the Kagel award and wanted to know if we would accept in-lieu-of claims as given to us by the Union." Harlan responded that the in-lieu-of claims would be accepted, but that such acceptance did not necessarily mean that the Respondent or the individuals listed in the in-lieu-of claims were going to be paid. Assurance was given by Respondent that "there would be no job action, no slowdown, no strikes" if the Mossman Star was loaded.

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[5] The vessel Mossman Star was scheduled to dock at the Weyerhaeuser facility the following day.

On October 14, 1981, Respondent's attorney wrote the Acting Regional Director as follows:

> Dear Mr. Nelson:
>
> In response to Dean Peterson's letter to you dated October 2, 1981, please be advised that Local 32 intends to take all appropriate legal action to enforce the right of its members to time in lieu payments pursuant to the final and binding arbitration award issued by Arbitrator Sam Kagel on September 16, 1981. Such payments will not effect Weyerhaeuser or any rights it may have under the Section 10(k) award in the above case. No work stoppage or other interference with Weyerhaeuser's operations is contemplated.
>
> Yours very truly,
> LAW OFFICES OF NORMAN LEONARD
>
> /s/ William H. Carder

By letter dated October 23, 1981, the Acting Regional Director advised all interested parties that the Respondent had engaged in conduct inconsistent with its original notice of intent to comply with the Board's 10(k) determination, that he was revoking his dismissal of the matter and reopening the case for further proceedings, including the issuance of a complaint. The instant complaint was issued on October 29, 1981. The Respondent has submitted a number of time-in-lieu claims against Jones, none of which have been paid. Respondent has filed a civil action in the United States District Court pursuant to Section 9 of the Federal Arbitration Act and Section 301 of the Act wherein it seeks to confirm and enforce the Kagel arbitration award and require PMA to pay Respondent damages for breach of the collective-bargaining agreement in an amount equal to the in-lieu-of payments referred to in the arbitration award.

Discussion

The General Counsel contends that by filing the "in-lieu-of" claims and by attempting enforcement of the Kagel arbitration award, the Respondent has failed to comply with the Board's 10(k) determination and has engaged in prohibitive economic

coercion of Jones and PMA with an object of forcing or requiring Weyerhaeuser to assign the disputed work to its members, rather than to employees who are members of AWPPW.

The Respondent argues that it has not made any demands on Weyerhaeuser with respect to the assignment of the work in question and has totally refrained from engaging in any threatening or coercive conduct in contravention of the Board's 10(k) determination. To the contrary, it argues, it has engaged only in "appropriate legal action" to enforce the provisions of the PCLCD as between itself and PMA and its member-employers, including Jones. It is further argued that it has not disrupted or interfered with the normal business operations of any employer, nor sought the aid of other unions. Rather, it is pointed out, it has repeatedly given assurances that it did not contemplate such action. It argues that where a union resorts only to its contractual grievance machinery and thereafter files a lawsuit to enforce a collective-bargaining agreement, the Union does not engage in "coercive" conduct in violation of Section 8(b)(4)(B).

I think it useful here to determine first the question of whether Respondent's action had as an object the forcing or requiring of Weyerhaeuser to assign the disputed work to its members rather than to employee members of AWPPW. To find the underlying object of an activity, one must look to the full context of circumstances in which it occurred.

In the 10(k) hearing, "the parties stipulated that on December 21, 1980, employees represented by ILWU [Respondent herein] engaged in a work stoppage for the purpose of forcing or requiring the employer [Weyerhaeuser] to assign particular work to employees represented [by] ILWU rather than to employees represented by AWPPW." [6] It is further clear that the issue presented to Coast Arbitrator Kagel was bottomed on Respondent's claim that the same work in dispute should be performed by its members rather than by Weyerhaeuser's employees who were

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[6] 256 NLRB No. 24, p. 9 of sl. op.

represented by AWPPW. [7] It further appears that the contentions made by Respondent before Kagel were considered by the Board in the 10(k) proceeding. Respondent's Director of Benefits, John Waddell, testified in the instant hearing that while Respondent has not engaged in any work stoppages, picketing or other type job action since December 21, 1980, the Respondent has "worked . . . through the Coast lawyer, to try to obtain the work." Business agent Hudson admitted herein that one of the reasons Jones had been asked to live up to the Kagel award was because the Respondent wanted the work in dispute. [8] Thus, Respondent's claim that it does not seek assignment of the work covered by the 10(k) award has a hollow ring. There can be no doubt that the original work stoppage occurred because Respondent sought the work in dispute and that it continues to seek assignment of the disputed work to it, contrary to the Board's Decision and Determination of Dispute, through the imposition of a wage liability for unperformed work. It seems apparent then that the Respondent's resort to the arbitration mechanism, and the enforcement of the Kagel decision through the District Court, is but a continuation of its jurisdictional claim to the work to which the Board has found it is not entitled. In that respect, it has not complied with the Board's Decision and Determination of Dispute. The fact Respondent has sought to rest its claim on an arbitrator's award or upon its agreement with PMA does not detract from the continuing jurisdictional nature of the dispute.

Section 8(b)(4)(ii)(D) makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person engaged in commerce" where an object is "forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization. . . ." The Respondent claims it has totally refrained from any threatening or coercive conduct in contravention of the 10(k) Determination. Respondent also argues that its conduct in proceeding to binding agreement with PMA cannot amount to a

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[7] See Opinion and Decision of Coast Arbitrator Kagel attached hereto as Appendix A.

[8] See transcript pages 75 and 77.

violation of Section 8(b)(4)(D) because it " 'totally refrained from engaging in any non-judicial acts of self help', and had only 'follow[ed] the procedures set forth in . . . its contract. . . .' "

The General Counsel argues, in effect, that since Jones, a neutral to the jurisdictional dispute, does not have the power to assign the disputed work, the foreseeable consequences of pressing the "in-lieu-of" claims, is to apply economic pressure on Jones so that Jones will force or require Weyerhaeuser to assign the disputed work to Respondent's members.

It is implicit that if Jones is compelled to pay wages for work not performed, it will suffer economically, and the incentive will be to either cease doing business with Weyerhaeuser or to force or require Weyerhaeuser to reassign the disputed work to Respondent's members. Respondent has at all times known that Jones had no control over the disputed work, and its representatives admitted in the instant proceeding that the reason it sought to enforce the Kagel award was because Respondent wanted the work in dispute assigned to it.[9] Therefore, it seems clear that enforcement of the Kagel award has been used as an economic device against PMA and its members, including Jones, so that they will either cease doing business with Weyerhaeuser or force or require Weyerhaeuser to reassign the disputed work to Respondent's members as the condition for avoiding the continuing imposition of a wage liability for unperformed work.[10] In these circumstances I conclude and find that Respondent's use of the Kagel award in connection with its claim for "in-lieu-of" payments amounted to prohibited economic coercion.

In *National Association of Broadcast Employees and Technicians, AFL-CIO, CLC, (Metromedia, Inc.)*, 255 NLRB No. 57

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[9] Hudson admitted this to be the object of Respondent's action.

[10] A cease doing business object may be cognizable under both 8(b)(4)(D) as well as 8(b)(4)(B). *Local No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Arther Venneri Co.) v. N.L.R.B.*, 321 F.2d 366, 371 (C.A.D.C.), cert. denied 375 U.S. 921 (1963).

(1981), cited by Respondent, the Board was presented with the issue of whether NABET's filing of grievances and of a Section 301 suit to compel arbitration demonstrated a refusal to abide by the Board's prior 10(k) award and constituted restraint or coercion within the meaning of Section 8(b)(4)(ii)(D) of the Act. Contrary to the undersigned Administrative Law Judge, the Board found no violation. In so deciding, the Board pointed out that its earlier 10(k) award was ambiguous and led to conflicting interpretations by the parties. It went on to state:

> Our concern is the object of Respondent's conduct in filing the grievances and the Section 301 lawsuit, and for that purpose it is sufficient that the interpretation of the 10(k) award was open to reasonable doubt by the parties affected by it, because of its ambiguity and because of changed circumstances resulting from the passage of time.
>
> In addition, we find it relevant that Respondent filed the grievances relating to live broadcasting under a contract executed almost 2 years after the 10(k) award, that Respondent's grievances are colorable under the contract, and that the contract itself does not, in our judgment, represent an attempt by either Respondent or the Employer to circumvent the 10(k) award to the detriment of employees represented by IATSE.

The Board concluded that since its 10(k) determination did not clearly address the work in dispute in that case, a subsequently negotiated contract provided a "colorable basis" for the grievances and also appeared to accommodate the prior award assignment of the work to the other union. It has not been claimed in the present case that there was any ambiguity in the 10(k) award, and the testimony clearly shows that the Respondent's object in enforcing the Kagel award was to obtain the work assigned to AWPPW in the 10(k) award. In these circumstances, I conclude that Respondent does not have a "colorable basis" for its claim based on the Kagel award.

Section 10(k) notes only one instance in which the Board is directed to defer to an arbitrator's award: when the Board has satisfactory evidence that the parties have adjusted or agreed

upon methods for the voluntary adjustment of the dispute. The proceedings before Kagel did not include either AWPPW or Weyerhaeuser. Thus, there was no agreement for the voluntary adjustment of the dispute, and the Board properly proceeded to make the determination. As stated by the Sixth Circuit Court of Appeals in *International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW) and its Local 1519* v. *Rockwell International Corporation*, 619 F2d 580 (1980):

> Once the NLRB decides a work assignment dispute, its determination takes precedence over a contrary arbitrator's award. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964); *NLRB v. Radio & Television Broadcast Engineers, supra; New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755 (5th Cir. 1966). This is true regardless of which action was initiated first. *Dock Loaders and Unloaders, ILA Local No. 854 v. Richeson & Sons, Inc.*, 280 F.Supp. 402 (E.D.La.1968). In *Carey*, the Court specifically noted that where a NLRB determination and an arbitrator's award conflict, the former's ruling would take precedence. Further, "[t]he superior authority of the Board may be invoked at any time." 375 U.S. at 272, 84 S.Ct. at 409. *Accord, New Orleans Typographical, supra.*
>
> * * * * *
>
> Both the legislative history of the LMRA and the case law on this issue support a finding that a NLRB Section 10(k) determination is to take priority over a contrary arbitrator's award in the dispute.

The Court went on to hold that when an employer has been acting in accord with a 10(k) ruling, "it is not liable for damages to the disappointed union."

Upon the foregoing, I conclude and find that by filing "in-lieu-of" claims and attempting to enforce the Kagel arbitration award, thereby undermining the Board's authority to resolve jurisdictional disputes, the Respondent has failed to comply with the Board's 10(k) Decision and Determination of Dispute and has engaged in prohibited economic coercion of Jones and PMA with an object of forcing or requiring Weyerhaeuser to assign the

disputed work to its members rather than to employees who are members of AWPPW. Such conduct violates Section 8(b)(4)(ii)(D) of the Act, substantially as alleged in paragraphs 10 and 11 of the compaint as amended. See, for example, *Brotherhood of Teamsters & Auto Truck Drivers Local No. 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Americal (PMA)*, 244 NLRB 801 (1976).

Conclusions of Law

1. Respondent, Local 32, International Longshoremen's and Warehousemen's Union and Association of Western Pulp and Paper Workers, Local 10, are labor organizations within the meaning of Section 2(5) of the Act.

2. Weyerhaeuser Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act by failing and refusing to honor and comply with the Board's Decision and Determination of Dispute reported in 256 NLRB No. 24 by filing "time-in-lieu" claims for work performed by members of AWPPW, and by maintaining a lawsuit in the United States District Court, praying for an order confirming and enforcing the award of Coast Arbitrator Sam Kagel and requiring Pacific Maritime Association and its employer-members to pay money damages equal to "time-in-lieu" payments pursuant to the arbitration award, with an object of forcing or requiring Weyerhaeuser Company to assign the work described below to employees represented by Respondent rather than to employees represented by AWPPW.

The work consists of:

> The handling of cargo from the warehouse or last point of rest to shipside and the tying up and casting off lines of vessels at Weyerhaeuser Company's dock in Everett, Washington.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

ORDER

Respondent, Local 32, International Longshoremen's and Warehousemen's Union, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Failing and refusing to honor and comply with the Board's Decision and Determination of Dispute reported in 256 NLRB No. 24, by filing "time-in-lieu" claims for work performed by members of Association of Western Pulp and Paper Workers, Local 10, and by maintaining a lawsuit in the United States District Court praying for an order confirming and enforcing the award of Coast Arbitrator Sam Kagel and requiring Pacific Maritime Association and its employer-members to pay money damages equal to "time-in-lieu" payments pursuant to the arbitration award, with an object of forcing or requiring Weyerhaeuser Company to assign the work described below to employees represented by Local 32, International Longshoremen's and Warehousemen's Union rather than to employees represented by Association of Western Pulp and Paper Workers, Local 10. The work consists of:

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[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

The handling of cargo from the warehouse or last point of rest to shipside and the tying up and casting off lines of vessels at Weyerhaeuser Company's dock in Everett, Washington.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Withdraw, cease filing and attempting to enforce "time-in-lieu" claims for work performed by members of Western Pulp and Paper Workers, Local 10, at Weyerhaeuser Company's dock in Everett, Washington.

(b) Post in conspicuous places in its business offices, meeting halls, and all other places where notices to members are customarily posted copies of the attached notice marked "Appendix B."[12] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative of Respondent, shall be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Sign and mail sufficient copies of said notice to the Regional Director for Region 20 for posting by the employer-members of Pacific Maritime Association and Weyerhaeuser Company, where notices to their employees are usually posted, if said employers are willing.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[12] In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices other than those specifically found herein.

Dated: July 30, 1982.

JAMES S. JENSON

James S. Jenson
Administrative Law Judge

APPENDIX A

In the Matter of an Arbitration between

International Longshoremen's and Warehousemen's Union,
Complainant,

and

Pacific Maritime Association,
Respondent.

Re: Jurisdiction—Weyerhaeuser Dock, Everett, Washington
Arbitration Award W-1-81 Coast LRC Referral PS-4-81

C-11-81

Opinion and Decision of

Sam Kagel, Coast Arbitrator

San Francisco, California
September 16, 1981

Background:

The barge Skipanon berthed at the Weyerhaeuser T-M facility in Everett, Washington, on January 29, 1981, and ordered a T-144 manning of six men to work aboard the barge loading lumber. The cargo of lumber had been dock-stored in advance of the barge's arrival by Weyerhaeuser Employees who regularly work at a Weyerhaeuser facility at a different location. These Weyerhaeuser Employees, members of APPWU Local 20, were also utilized by Weyerhaeuser to take the lines of the barge and to operate forklifts to move the cargo from dock storage to the barge. The ILWU Local claimed that the work of handling lines on the dock and the movement of the cargo from dock storage to the barge should be performed by ILWU Longshoremen. After disagreement by ILWU/PMA Joint Port Labor Relations Committee, the issue was referred to the Area Arbitrator, who in turn referred the matter to the Joint Coast Labor Relations Committe. The Joint Coast Labor Relations Committe heard the matter on February 25, 1981, and their disagreement on the issue is shown in the minutes of their Meeting No. 4-81 (Jt. Ex. 3), as follows:

ISSUE:

"Arbitrator's Referral re Jurisdiction, Weyerhauser Dock, Everett (PS-04-81, Local 32).

"The Committee discussed Area Arbitrator's Decision No. W-01-81, which referred this dispute involving jurisdiction of work performed at the Weyerhauser dock facility to the CLRC. The Union's position is that the employer, Crescent City Marine Ways & Drydock Co., Inc., should have hired longshoremen to handle lines and operate forklifts to move lumber from dock storage to the barge since this is a new operation as contemplated by Sections 10.5 and 10.51 of the PCLCD.

"The Employers' position is that the employer does not have control of the cargo until the cargo reaches ship's tackle. The cargo was under the control of a nonmember of the Association as provided in Section 1.46 of the PCLCD.

"Disagreement reached."

DISCUSSION:

The record in this case shows that the T-M facility in Everett was considered an industrial dock in the past, as defined in the PCLCD; that, when it was operating as an industrial dock, Weyerhaeuser Employees belonging to APPWU Local 10 would move the cargo from stowage to ship's hook or to a barge; that the T-M facility was closed down as a pulp manufacturing facility in December of 1980, and that no products have been manufactured there since.

The Union does not question the advance dock storage of the cargo. Union Counsel Rubio stated (Tr. 11) as follows:

"Keep in mind that the cargo is dock-stored prior to the arrival of the barge. It is trucked in or brought in by rail. We are not questioning who dock-stores it. The point is that once the barge comes in, the movement of the cargo, under Sections 1.1 and 1.11, from the point of rest to the ship's hook is longshore work."

The Union contends that since the T-M facility is no longer an industrial dock, the past exception of assigning dock work to other than Longshoremen no longer applies to this facility; that the T-M facility should be considered as a new, commercial operation in which dock work belongs to Longshoremen; that Section 1.45 governs and supports the Union's position.

The Employers contend that the cargo comes under the control of the PMA member at ship's tackle; therefore, Section 1.11 applies and the member cannot be held responsible for the movement of the cargo from the point of stowage on the dock to the barge.

The Employers do not contend that the T-M facility is an industrial dock but do contend that as a private dock Section 1.46 of the PCLCD should be considered applicable and that the non-member's (Weyerhaeuser's) Employees should be permitted to perform the work in question. The Employers also submitted documentation as to the manner in which the regulated carrier freights the cargo on the basis of providing transportation only from ship's tackle at point of origin.

The controlling factor in this case is the fact situation of the T-M facility as it relates to Section 1.45 of the PCLCD. It was an industrial dock and had an execption. When the manufacturing of pulp ceased in December of 1980, the status as an industrial dock ceased and it, in effect, became a commercial dock although privately owned, and it cannot now be claimed that other exceptions under the PCLCD should be applicable.

DECISION:

1. The Union's claim that the lines work and the movement of cargo from dock stowage to the barge SKIPANON at the T-M facility in Everett on January 29, 1981, should have been assigned to Longshoremen is sustained.

2. The Union's claim for time-in-lieu for the number of non-unit Employees utilized to perform such work is sustained.

/s/ SAM KAGEL
Coast Arbitrator

APPENDIX B

Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to honor and comply with the Board's Decision and Determination of Dispute reported in 256 NLRB No. 24, by filing "time-in-lieu" claims for work performed by members of Western Pulp and Paper Workers, Local 10, and by maintaining a lawsuit in the United States District Court praying for an order confirming and enforcing the award of Coast Arbitrator Sam Kagel and requiring Pacific Maritime Association and its employer-members to pay money damages equal to "time-in-lieu" payments pursuant to the arbitration award, with an object of forcing or requiring Weyerhaeuser Company to assign the work described below to employees represented by Local 32, International Longshoremen's and Warehousemen's Union rather than to employees represented by Association of Pulp and Paper Workers, Local 10. The work consists of:

> The handling of cargo from the warehouse or last point of rest to shipside and the tying up and casting off lines of vessels at Weyerhaeuser Company's dock in Everett, Washington.

WE WILL withdraw, cease filing and attempting to enforce "time-in-lieu" claims for work performed by members of Western Pulp and Paper Workers, Local 10, at Weyerhaeuser Company's dock in Everett, Washington.

LOCAL 32, INTERNATIONAL
LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

Appendix E

United States of America

Before the National Labor Relations Board

256 NLRB No. 24

Case 19—CD—377

Local 32, International Longshoremen's and Warehousemen's Union

and

Weyerhaeuser Company

and

Association of Western Pulp and Paper Workers, Local 10

Decision and Determination of Dispute

This a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Weyerhaeuser Company, herein called the Employer, alleging that Local 32, International Longshoremen's and Warehousemen's Union, herein called ILWU, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by Association of Western Pulp and Paper Workers, Local 10, herein called AWPPW.

Pursuant to notice, a hearing was held before Hearing Officer Mark E. Brennan on January 19. 1981. All parties appeared and were afforded full oportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free freom prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. The Business of the Employer

The parties stipulated, and we find, that the Employer, a Washington corporation, is engaged in the business of manufacturing wood products. During the past calendar year, a representative period, the Employer realized gross revenues in excess of $500,000 and, during the same period, sold goods valued in excess of $50,000 directly to customers located outside the State of Washington. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

The parties stipulated, and we find, that Local 32, International Longshoremen's and Warehousemen's Union and Association of Western Pulp and Paper Workers, Local 10, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Dispute

A. Background and Facts of the Dispute

The Employer is an integrated forest products company with timber holdings and various manufacturing operations located in Washington, Oregon, and other States, as well as foreign countries. As part of its overall operation the Employer owns and operates several private docks used to transport its own and other manufacturers' products. The instant dispute involves the Employer's dock located at Everett, Washington.

The Everett dock has been in existence since approximately 1902. Since 1936 the Employer has operated the Sulphite Mill adjacent to the Everett dock, at which a chemical woodpulp was produced. In 1953, the Employer began to operate the Kraft Mill, which is located approximately 3 miles from the Everett dock and produces woodpulp. Products produced at the Kraft and Sulphite Mills were exported across the Everett dock.

In 1964, the AWPPW became the certified collective-bargaining representative for the Employer's employees at both the Kraft

and Sulphite Mills. Employees at the Sulphite Mill came under the jurisdiction of Local 20 of AWPPW while the Kraft Mill employees came and remain under the jurisdiction of the AWPPW's Local 10.

In 1975, the Employer ceased operation of the Sulphite Mill and commenced operation of the Thermo-Mechanical Mill (T-M) which produced a high yield type pulp. The T-M Mill was also located adjacent to the Everett dock and approximately 70 percent of its total production was exported across the Everett dock. As was the case with the Sulphite Mill, AWPPW's Local 20 represented the T-M Mill employees.

Since at least 1977 the goods exported across the Everett dock, in addition to those of the Kraft and T-M Mills, have included pulp from Kamloops, British Columbia; pulp from Casmopolis, Washington, lumber from the Employer's Mills "E" and "B"; and plywood from the Employer's Snoqualmie, Washington, mill.

The foregoing goods are transported by truck to the Everett dock area from the various sites. The trucks are then unloaded and the goods are "highpiled" in warehouses adjacent to the dock where they are inspected and tallied by the Employer's dock superintendent. When informed of an imminent shipment, the dock superintendent devises a "plan" for the loading of cargo. Goods in the warehouse are then marked in accordance with the plan which specifies the order of the loading as well as the particular hatch of the ship in which goods will be placed.

When a ship arrives at the Everett dock, employees of the Employer tie the ship to the dock. Meanwhile, piles of cargo are broken down in the warehouse and brought onto the dock to shipside by forklift operators who are also employees of the Employer. In some instances, goods have been "high-piled" on the dock and subsequently broken down again and moved to shipside by the forklift operators. Prior to December 1980, the employees involved in ship tie-up and bringing goods from the warehouse to shipside (as well as casting off the ship's tie-up lines) were the Employers employees represented by AWPPW and assigned to the shipping department of the T-M Mill.

Once the goods have been placed at shipside the cargo is hooked to the ship's gear and lifted by crane into the hold of the ship. The work involved in this operation has traditionally been performed by employees represented by ILWU. These employees are employed by Jones-Washington Stevedoring Company, herein called JWSC. JWSC maintains a contract with the Employer by which JWSC is paid its incurred expenses, including wages and other compensation of its employees, as well as a "management fee" calculated on a "cost-plus" basis.

JWSC is a member of the Pacific Maritime Association, herein called PMA. PMA is an employer association comprised of various stevedoring and shipping companies. PMA is party to a collective-bargaining agreement with ILWU entitled "Pacific Coast Longshore Contract Document," herein called PCLCD. That contract establishes, *inter alia*, wage and other compensation levels for employees of PMA member employers such as JWSC. It is these wage and compensation levels that are paid to JWSC by the Employer as part of their cost-plus contract arrangement noted above. The Employer is not a member of PMA and is not a signatory to the PCLCD.

Thus, at the time the events giving rise to the instant dispute occurred, work at the Everett dock was performed as follows: the tying up and casting off of ships at the dock was performed by employees of the Employer represented by AWPPW. These same employees also performed the work of moving goods from the warehouse by forklift to shipside. Once the goods were at shipside, employees represented by ILWU performed the work of hooking the goods to the ship's gear and actually loading the ship.

In the latter part of 1980, the Employer decided to close the T-M Mill located adjacent to the Everett Dock. It so informed Local 20, AWPPW, which represented the T-M Mill employees, including the ship tie-up persons and forklift operators. Although closure of the T-M Mill eliminated manufacturing work at that facility it was determined that cargo dock work at the Everett dock would continue. This work included export of the stockpiled T-M Mill products as well as the products of the Kraft and other mills noted above that traditionally exported goods across the Everett dock.

As a result of the announced closing of the T-M Mill, the T-M Mill's employees represented by Local 20, AWPPW, voted to affiliate with Local 10, AWPPW, which represents the Kraft Mill employees. The Employer voluntarily recognized Local 10 as the representative of such employees. The Employer entered into an agreement with both Local 10 and Local 20 providing that the Employer's employees formerly represented by Local 20 who had performed the cargo and dock work at the Everett dock would continue to be assigned that work although they had become formally assigned to the Kraft Mill.

On or about December 12, 1980, the T-M Mill ceased manufacturing operations. As noted above, however, the dock operations continued unabated as stockpiled goods from the T-M Mill, of which there was a 6-month supply, and goods from other facilities continued to be exported across the Everett dock. Work at the dock continued in the same manner as before the T-M Mill closing. Employees of the Employer represented by AWPPW continued to tie up and cast off vessels and move goods from their last place of rest to shipside with the use of forklifts. Employees represented by ILWU continued to move goods from shipside onto the vessel. Thus, the only "change" in the status quo was a change in affiliation for the dock employees from Local 20, AWPPW, to Local 10, AWPPW.

On December 21, 1980, employees represented by ILWU engaged in a work stoppage for 45 minutes at the Everett dock to protest the Employer's assignment of work at the Everett dock.

B. The Work in Dispute

The work in dispute involves the handling of cargo from the warehouse or last point of rest to shipside at the Employer's dock located at Everett, Washington, and the tying and untying of lines of vessels docked at the Everett dock.

C. The Contentions of the Parties

The Employer contends that the disputed work should be assigned to its own employees represented by AWPPW. It asserts that such an assignment is in accord with the longstanding and traditional practice which is embodied in both existing and prior

collective-bargaining agreements between it and AWPPW. The Employer also argues that an agreement to which it and ILWU are bound dictates assignment of the work to employees represented by AWPPW. Finally, the Employer contends that efficiency and economy of operations favor assignment to employees represented by AWPPW.

The AWPPW contends that the work should be assigned to the employees it represents. For the most part, AWPPW's arguments parallel those of the Employer with special emphasis upon the established practiced and bargaining history which demonstrate that the disputed work has traditionally been done by employees represented by AWPPW.

The ILWU contends that the disputed work should be assigned to employees it represents. The cornerstone of its argument is that with the closing of the T-M Mill the Everett dock ceased to be an "industrial dock" and became a "commercial dock." ILWU asserts that pursuant to its agreement with the Pacific Maritime Association (PMA), the industry practice is to have work of the type in dispute performed by employees represented by ILWU. ILWU also contends that efficiency of operations dictates such an assignment and further claims that the historic collective-bargaining agreements between AWPPW and the Employer do not clearly define the disputed work as belonging to employees represented by AWPPW.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

At the hearing, the parties stipulated that on December 21, 1980, employees represented by ILWU engaged in a work stoppage for the purpose of forcing or requiring the Employer to assign particular work to employees represented ILWU rather than to employees represented by AWPPW. In addition, there

exists no agreed-upon method for the voluntary adjustment of the disputed work.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors. [1] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common-sense and experience reached by balancing those factors involved in a particular case. [2]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

There are no collective-bargaining agreements to which all parties in the instant dispute are signatories. The Employer, however, refers to a settlement agreement entered into in 1973 between the Employer, ILWU, and International Woodworkers of America, AFL-CIO (IWA). A principal purpose of the settlement agreement was to settle pending litigation involving work disputes at certain log yards of the Employer. The preamble provision of the agreement states also that its purpose is "to regulate their [the parties'] present and future relationships . . ." upon the terms set forth therein. More important, asserts the Employer, is paragraph 3(a) of the agreement which provides:

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[1] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO (Columbia Broadcasting System)*, 364 U.S. 573 (1961).

[2] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

> Past work practices will be maintained at all other existing facilities and docks owned or operated by Weyerhaeuser. Future changes of forest products cargo will not require changes in past work assignments.

The Employer argues that it is merely continuing past work practices and that the closing of the T-M Mill is, at most, a change in forest products cargo.

The parties also present extensive arguments concerning terms in the collective-bargaining agreement between ILWU and PMA referred to herein as PCLCD. The Employer argues initially that, since it is not a PMA member, the PCLCD is not binding upon it, yet even if the document is relied upon, certain terms contained therein support the view that employees represented by AWPPW are entitled to the work. ILWU argues that the PCLCD clearly mandates that the work be assigned to employees it represents.

The provision relied upon heavily by ILWU, paragraph 1.45, states:

> The movement of cargo to or from a vessel on an industrial dock shall be defined as work covered by this contract document and is assigned to longshoremen. Existing practices under which other workers perform such dock work of an existing facility may be continued. An industrial dock is a dock at a facility where materials are manufactured and are processed and from which they are shipped or at which materials used in the manufacture or process are received and the dock operator has a proprietory interest in such materials.

ILWU argues that, when the T-M Mill closed, the Everett dock ceased to be an "industrial dock," thereby removing the "exception" by which non-ILWU employees had been allowed to perform the disputed work.

The Employer seeks to counter this argument with other PCLCD provisions. It cites paragraph 1.11 which states:

> This Contract Document covers the movement of outbound cargo only from the time it enters a dock and comes under

> the control of any terminal, stevedore agent or vessel operator covered by this Contract Document. . . .

The Employer argues that Jones-Washington, the stevedoring company involved herein, does not take control of the goods until they are placed at shipside. Prior to that point, it argues, non-ILWU employees are entitled to perform the work. The Employer asserts that its position is butteressed by paragraph 1.46 of the PCLCD which provides:

> Where a non-member of the Association has control over the cargo at its premises or on its vessels, such non-member regular employees may perform work assigned to longshoremen herein while such cargo is out of the control of any member.

In our view, none of the foregoing collective-bargaining agreement provisions, standing alone, is dispositive of the instant dispute. We do find, however, a repeated and consistent contractual deference to the maintenance of traditional, longstanding work assignments, independent of the particular parties involved. Thus, to the extent the provisions favor any of the parties, we find them to be more consistent with the Employer's and AWPPW's view that the work should continue to be assigned to the Employer's and employees represented by AWPPW.

2. Company and industry practice

The ILWU argues that industry practice requires an award of the work to employees it represents. The ILWU relies again on the PCLCD as an indication of industry practice. That agreement provides that employees represented by ILWU are entitled to the work of moving goods from their last point of rest onto ships where the PMA member employer has taken control of the goods. ILWU also relies on the 1973 settlement agreement which assigns the work of moving Weyerhaeuser logs from their last place of rest onto ships at the Employer's Tacoma log sort yard and dock. It also points to its agreement with the Teamsters Union which provides that ILWU represented employees are entitled to move goods from their last place of rest onto ships where the PMA member company has taken control of the goods.

The Employer and AWPPW emphasize the past practice of the Employer rather than industry wide practices. Again, emphasis is placed on the long history of the Employer's assignment of the disputed work to its own employees represented by AWPPW pursuant to a longstanding collective-bargaining relationship. Although lacking in details, there is testimony in the record that the type of work in dispute is performed in the same manner at the Everett dock as at other Weyerhaeuser docks.

Based upon the foregoing, we find that while industry practice may favor an award to employees represented by ILWU, the well-established practice at this facility is for the Employer to assign the work to its employees represented by AWPPW.

3. Relative skills; economy and efficiency of operations

With respect to the operation of the forklifts and the line work on the ships, the relative skills of the employees involved appear to be comparable. It does appear, however, that employees of the Employer represented by AWPPW are familiar with the warehouse coding system and, therefore, are more skilled and efficient in removing the proper goods from the warehouse. In addition, as employees of the Employer, they are available to perform miscellaneous tasks in the warehouse and on the dock when not performing the specific work in dispute.

We find, therefore, that relative skills as well as economy and efficiency of operations favor an award to employees represented by AWPPW.

4. Joint board determinations; union agreements; arbitration decisions

There are no joint board determinations or union agreements apart from those noted above that provide assistance in resolving the instant dispute. The parties did introduce several arbitration awards. We find, however, that such awards provide no meaningful aid in resolving the dispute in that each of the awards turns upon particular facts not present here.

5. Employer preference

The Employer has, throughout this proceeding, repeatedly stated its preference that the disputed work be awarded to its employees represented by AWPPW.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees of the Employer who are represented by the Association of Western Pulp and Paper Workers, Local 10, are entitled to perform the work in dispute. We reach this conclusion relying on the expressed preference of the Employer; the longstanding history of assigning the disputed work to employees represented by AWPPW; the contractual provisions which indicated deference to existing work assignments; and the consideration of relative skills and economy of operations. In making this determination, we are awarding the work in question to employees who are represented by AWPPW, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Weyerhaeuser Company, who are represented by Association of Western Pulp and Paper Workers, Local 10, are entitled to perform the work of the handling of cargo from the warehouse or last point of rest to shipside and the tying up and casting off lines of vessels at the Employer's dock at Everett, Washington.

2. Local 32, International Longshoremen's and Warehousemen's Union is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Weyerhauser Com-

pany to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 32, International Longshoremen's and Warehousemen's Union shall notify the Regional Director for Region 19, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

Dated, Washington, D.C. May 27, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

Appendix F

STATUTES

29 U.S.C. § 158. Unfair labor practices

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

29 U.S.C. § 160. Prevention of unfair labor practices—Powers of Board generally

Hearings on jurisdictional strikes.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

29 U.S.C. § 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry

affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jursidiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Supreme Court, U.S.
FILED
MAY 9
JOSEPH F. SPANIOL, JR
CLERK

No. 85-1486

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 32, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, PETITIONER

v.

PACIFIC MARITIME ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly found that the union violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act by suing to enforce an arbitration award for an employer's failure to assign work to the union's members, where a prior Board decision under Section 10(k) of the Act awarded the work to employees of another employer represented by another union.

2. Whether the union's suit under Section 301 of the Labor Management Relations Act to enforce the arbitration award was properly dismissed by the district court where the award was inconsistent with the Board's Section 10(k) determination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 773 F.2d 1012. The opinion of the district court (Pet. App. A19-A21) is unreported. The decisions of the National Labor Relations Board (Pet. App. A22-A43, A44-A55) are reported at 271 N.L.R.B. 759 and 256 N.L.R.B. 167.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1985. A petition for rehearing and suggestion for rehearing en banc were denied on December 10, 1985 (Pet. App. A17-A18). The petition for a writ of certiorari was filed on March 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Weyerhaeuser, an integrated forest products company, owns and operates a dock at Everett, Washington. Goods produced at Weyerhaeuser mills in the Pacific Northwest are stored in warehouses at the dock and then shipped in barges and ocean-going vessels. Weyerhaeuser employees at the Everett dock are represented by the Association of Western Pulp and Paper Workers (AWPPW). Weyerhaeuser's AWPPW employees are responsible for tying the ships to the dock, moving goods from Weyerhaeuser's warehouse to shipside, and casting off the ship's tie-up lines. Pet. App. A25-A27, A45-A46.

After the goods have been placed at shipside by Weyerhaeuser's AWPPW employees, the cargo is loaded into ships by employees of stevedoring companies under contract with Weyerhaeuser. The stevedoring companies involved in this case, Jones-Washington Stevedoring Company and Crescent City Marine Ways and Drydock Company, are members of the Pacific Maritime Association (PMA), a multi-employer group. Their employees are covered by a collective bargaining agreement between PMA and petitioner Local 32, International Longshoremen's and Warehousemen's Union. That agreement is known as the Pacific Coast Longshore Contract Docu-

ment (PCLCD). Weyerhaeuser is not a member of PMA and is not a party to the PCLCD. Pet. App. A2, A26-A27, A47.

Until late 1980, Weyerhaeuser conducted manufacturing operations at a mill adjacent to the Everett dock. Production employees at the mill were also represented by AWPPW. In December 1980, Weyerhaeuser ceased manufacturing at that mill. Stockpiled goods from that plant and goods from other facilities continued to be shipped from the Everett dock, however, and operations at the dock continued in the same manner as before. Weyerhaeuser employees represented by AWPPW continued to move goods from their last place of rest to shipside and to tie up and cast off vessels. Stevedore employees represented by petitioner continued to move goods from shipside into the ships. Pet. App. A27, A47-A48.

On December 21, 1980, Jones-Washington employees, represented by petitioner, engaged in a 45-minute work stoppage at the Everett dock to protest Weyerhaeuser's continuing assignment of its own employees, represented by AWPPW, for line handling and storage-to-shipside movement of cargo (Pet. App. A27, A48). Weyerhaeuser filed an unfair labor practice charge with the National Labor Relations Board alleging that petitioner violated Section 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(D), by engaging in a work stoppage at the Everett dock with the purpose of forcing the assignment of work performed by Weyerhaeuser's AWPPW employees to employees of stevedoring contractors represented by petitioner.[1] Pursuant to Sec-

[1] Section 8(b)(4)(D) provides that it shall be an unfair labor practice for a labor organization: (i) to engage in a

tion 10(k) of the Act, 29 U.S.C. 160(k), the Board scheduled a hearing on the jurisdictional dispute in which Weyerhaeuser, the AWPPW, and petitioner participated (Pet. App. A27, A44).

On May 27, 1981, the Board issued a Decision and Determination of Dispute under Section 10(k) awarding the disputed work to the Weyerhaeuser employees represented by AWPPW (Pet. App. A44-A55). The Board specifically noted that "[t]here are no collective-bargaining agreements to which all parties in the instant dispute are signatories" and that "there exists no agreed-upon method for the voluntary adjustment of the dispute" (*id.* at A50). The Board awarded the work to Weyerhaeuser's AWPPW employees based on "the expressed preference of [Weyerhaeuser]; the longstanding history of assigning the disputed work to employees represented by AWPPW"; provisions in the PCLCD contract "which indicate[] deference to existing work assignments; and the consideration of relative skills and economy of operations" (*id.* at A54). On June 8, 1981, petitioner notified the Board that it intended to comply with the Board's Section 10(k) determination (*id.* at A28). Weyerhaeuser's unfair labor practice charge accordingly was dismissed (*ibid.*). See 29 U.S.C. 160(k).

2. Meanwhile, prior to the Board's Section 10(k) decision, petitioner filed a grievance under the PCLCD alleging that Crescent City had violated the terms of that agreement by not obtaining the work assigned by Weyerhaeuser to its AWPPW-represented

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strike or work stoppage, or (ii) to threaten or coerce any person, with the goal of forcing an employer to assign work to one group of employees rather than to another group of employees. 29 U.S.C. 158(b)(4)(D).

employees for Crescent City's employees represented by petitioner (Pet. App. A40-A42). On September 16, 1981, after the Board had issued its Section 10(k) decision, an arbitrator upheld petitioner's grievance and concluded that under the PCLCD the disputed work should be assigned to stevedore employees represented by petitioner. The arbitrator awarded "time-in-lieu" payments for work that instead was performed by Weyerhaeuser's AWPPW employees (*id.* at A28, A40-A42). Because Weyerhaeuser and the AWPPW were not parties to the PCLCD, neither was eligible to participate in that proceeding.

On October 9, 1981, representatives of petitioner visited Jones-Washington's manager and asked whether Jones-Washington was going to abide by the arbitration award and dispatch employees represented by petitioner to do the work previously done by Weyerhaeuser employees. Jones-Washington's manager told petitioner that "we were going to order labor as directed by Weyerhaeuser and that was the only way we could go under the circumstances" (Pet. App. A28). When petitioner repeated its inquiry at a meeting the next day, a Jones-Washington official replied that the company could not claim the work for employees represented by petitioner because "there had been a ruling by the National Labor Relations Board awarding the work to Weyerhaeuser employees" represented by AWPPW (*id.* at A29).

On October 14, 1981, counsel for petitioner advised the Board by letter that petitioner intended to take "all appropriate legal action to enforce the right of its members to time in lieu payments pursuant to the * * * arbitration award" (Pet. App. A30). Soon thereafter, petitioner filed suit under Section 301(a)

of the Labor Management Relations Act (LMRA), 29 U.S.C. 185(a), seeking enforcement of the arbitration award and time-in-lieu payments for the disputed work. In response to petitioner's statement of its intent to pursue claims under the arbitration award, the Board's Acting Regional Director revoked his dismissal of the unfair labor practice charge and issued a complaint against petitioner (Pet. App. A30).

The Board, adopting the findings and conclusions of the administrative law judge (ALJ), found that petitioner violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act (29 U.S.C. 158(b)(4)(ii)(D)) by filing monetary claims under and seeking judicial enforcement of the arbitration award (Pet. App. A22-23, A24-A43). The Board stated that "the Board's Section 10(k) awards take precedence over any and all contrary arbitration awards" (Pet. App. A23), citing *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964). The Board also found that petitioner's attempt to enforce the arbitration award constituted a refusal to comply with the Board's determination under Section 10(k) that the work in dispute was to be performed by Weyerhaeuser's AWPPW employees (Pet. App. A22-A23) and was "but a continuation of its jurisdictional claim to the work to which the Board has found it is not entitled" (Pet. App. A32 (opinion of ALJ)). The Board adopted the ALJ's finding that "the original work stoppage occurred because [petitioner] sought the work in dispute and that it continued to seek assignment of the disputed work to it, contrary to the Board's Decision and Determination of Dispute, through the imposition of a wage liability for unperformed work" (*ibid.*). It also adopted the finding that "if Jones[-Washington] is compelled to

pay wages for work not performed, it will suffer economically, and the incentive will be to either cease doing business with Weyerhaeuser or to force or require Weyerhaeuser to reassign the disputed work to [petitioner's] members" (Pet. App. A33).

The Board concluded that petitioner's attempted use of a Section 301 suit "to enforce an arbitration award contrary to the Board's Section 10(k) award" resulted in "prohibited economic coercion * * * with an object of forcing or requiring Weyerhaeuser to assign the disputed work to its members rather than to employees who are members of AWPPW" (Pet. App. A23, A35-A36). The Board ordered petitioner to cease and desist from refusing to honor the Board's Section 10(k) decision "by filing 'time-in-lieu' claims * * * and by maintaining a lawsuit" seeking to enforce the arbitration award and compel the payment of damages (*id.* at A37).

Shortly after the Board's decision in the unfair labor practice case, the United States District Court for the Western District of Washington dismissed petitioner's Section 301 suit (Pet. App. A19-A21). The district court concluded that the arbitration award conflicted with the Board's Section 10(k) determination and that, "as between the two, the 10(k) determination of the NLRB must be deemed controlling" (*id.* at A21).[2]

3. The court of appeals enforced the Board's unfair labor practice order and upheld the district court's dismissal of the Section 301 action (Pet. App. A1-A16). The court agreed with the Board that "a section 10(k) decision must be given precedence over an arbitrator's contrary decision" (*id.* at A6, A15)

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[2] The Board intervened in the district court proceeding and urged that the lawsuit be dismissed.

and that "the arbitrator's award here conflicts with the NLRB's section 10(k) assignment of work to the AWPPW" (*id.* at A9). The court concluded that because petitioner's suit was an attempt "to circumvent the section 10(k) decision," an objective prohibited under the Act, "its suit amounts to an unfair labor practice" (*id.* at A9). Similarly, the court upheld the district court's refusal to enforce the arbitration award (*id.* at A12-A15).

ARGUMENT

The court of appeals correctly applied settled principles to the facts of this case. Its decision does not conflict with decisions of this Court or of other courts of appeals. Further review is therefore unwarranted.

1. The controlling principles in this case are well established. Section 8(b)(4)(D) of the National Labor Relations Act states that it shall be an unfair labor practice for a union to strike or otherwise to "threaten, coerce, or restrain any person * * * where * * * an object thereof is * * * forcing or requiring any employer to assign particular work to employees" represented by that union rather than to employees represented by another union. 29 U.S.C. 158 (b)(4)(D). Unlike the statutory procedure governing other unfair labor practices—where, upon the filing of a meritorious charge, a complaint is issued and an unfair labor practice proceeding is immediately instituted—the Board, upon the filing of a meritorious Section 8(b)(4)(D) charge, must first address the underlying jurisdictional dispute. *NLRB* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 123-124 (1971). Under Section 10(k), "it is the Board's responsibility and duty to decide which of

two or more employee groups claiming the right to perform certain tasks is right and then specifically to award such tasks in accordance with its decision." *NLRB* v. *Radio Engineers Union Local 1212*, 364 U.S. 573, 586 (1961).[3]

Where the union charged with an unfair labor practice agrees to comply with the Board's award of work to a competing union, the charge will be dismissed. *International Telephone & Telegraph Corp.* v. *Local 134, IBEW*, 419 U.S. 428, 439 (1975). But if the charged union refuses to comply with the Board's Section 10(k) determination and award of work, the Board will issue a complaint alleging a violation of Section 8(b)(4)(D), and on the basis of the refusal to comply the union may "be found guilty of an unfair labor practice and be ordered to cease and desist." *NLRB* v. *Plasterers' Local Union No. 79*, 404 U.S. at 127.

The Board's Section 10(k) resolution precludes a contrary arbitration award. The courts, of course, have jurisdiction under Section 301 of the LMRA, 29 U.S.C. 185, to compel arbitration of a work assignment dispute arising from a collective bargaining agreement. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964). However, once the Board has

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[3] Congress considered it "more important * * * that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions." *NLRB* v. *Radio Engineers Union Local 1212*, 364 U.S. at 576-577. Section 10(k) of the Act therefore requires that, absent a method for voluntary adjustment agreed upon by the parties, the Board must first determine the jurisdictional dispute between competing unions where, as in this case, one of the unions threatens or engages in a strike and is charged with a violation of Section 8(b)(4)(D). *Plasterers' Local Union No. 79*, 404 U.S. at 123-124, 137.

decided a work assignment dispute under Section 10 (k), the Board's decision is the final resolution of the matter and precludes enforcement of a contrary arbitration decision, whether the remedy is an actual award of the disputed work or an award of damages for the loss of such work. Thus, this Court has stated (375 U.S. at 272 (emphasis added)):

> Should the Board disagree with the arbiter * * * the Board's ruling would, of course, take precedence; *and if the employer's action had been in accord with that ruling, it would not be liable for damages under Section 301.*

In cases of conflict between an arbitration award and a Board decision under Section 10(k), "[t]he superior authority of the Board may be invoked at any time" (*ibid.*).

2. Petitioner does not dispute that its work stoppage properly triggered the Board's Section 10(k) jurisdiction or that the Board validly awarded the disputed work to AWPPW employees.[4] Rather, petitioner contends that its Section 301 suit was not in derogation of the Board's Section 10(k) award and that, in any event, judicial action in pursuit of an

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[4] Contrary to petitioner's implication (Pet. 16-17), there is no issue here concerning whether the mere filing of a grievance over a disputed work assignment can trigger an unfair labor practice charge under Section 8(b)(4)(D). Petitioner cites a decision (Pet. 17 n.10) in which the Board found a violation of Section 8(b)(4)(D) based on the filing of a grievance prior to the Board's Section 10(k) determination. But that case has been remanded by the Ninth Circuit to the Board pursuant to its sua sponte request for reconsideration. *Local 7, International Longshoremen's & Warehousemen's Union*, 273 N.L.R.B. No. 58 (Dec. 14, 1984), motion to remand granted, No. 85-7028 (9th Cir. Mar. 11, 1986).

objective in derogation of the Section 10(k) award is not prohibited by Section 8(b)(4)(ii), 29 U.S.C. 158(b)(4)(ii). These contentions are meritless.

a. Petitioner argues (Pet. 12-15) that there is no conflict between the arbitration award it sought to enforce and the Board's Section 10(k) decision because Weyerhaeuser remained free to assign the disputed work to its own employees represented by AWPPW. Petitioner maintains that Jones-Washington and other stevedoring companies covered by the PCLCD contract could escape the time-in-lieu obligations by ceasing to enter "into arrangements whereby employees of Weyerhaeuser perform longshoring tasks reserved by the PCLCD to employees represented by [petitioner]" (Pet. 13). Petitioner further asserts that, should the stevedoring companies not choose that course, nothing in the Section 10(k) award precludes a damage award to its members for breach of the PCLCD (*ibid.*). The Board, the district court and the court of appeals all properly rejected that argument.

The Board's Section 10(k) award states that Weyerhaeuser employees, represented by AWPPW, "are entitled to perform the work of the handling of cargo from the warehouse or last point of rest to shipside and the tying up and casting off lines of vessels" at the Everett dock (Pet. App. A54). The arbitration award grants the same work to petitioner, stating that petitioner's claim for "the lines work and the movement of cargo from dock stowage to [shipside] at the T-M facility in Everett * * * is sustained" (Pet. App. A42). It is not possible to seek enforcement of the arbitration award's grant of the disputed work to petitioner and simultaneously respect the Board's contrary and controlling award of that same work to the AWPPW-represented employees. Indeed,

the arbitrator granted petitioner time-in-lieu payments based on his conclusion that members of the AWPPW were improperly utilized "to perform such work" (*ibid.*).

Plainly, a demand for wages for work that other employees are performing is simply one means of asserting a jurisdictional right to the work. "From a workman's point of view, the valuable part of a right to a particular job is the right to be paid for it." *NLRB* v. *Local 1291, International Longshoremen's Ass'n*, 368 F.2d 107, 110 (3d Cir. 1966), cert. denied, 386 U.S. 1033 (1967). As that court further stated (*ibid.*):

> It follows that if workmen, who are entitled to a job under the terms of a labor contract, agree to forego the obligation of working but not the concomitant right to payment, they have not disclaimed any significant right. When * * * one group insists that work, for which another group has contracted and is being paid, be assigned it, the fact that both groups are claiming pay for the same work suffices to create a jurisdictional dispute, and it is irrelevant that either group, or both, may manifest a willingness to take the pay and forego the work.

Accord *International Brotherhood of Carpenters* v. *C.J. Montag & Sons, Inc.*, 335 F.2d 216, 221 (9th Cir. 1964).

Furthermore, as the Board found (Pet. App. A23, A31-A32), the facts here establish that petitioner was attempting to use the arbitration award to obtain the disputed work. Soon after the arbitrator's decision, petitioner approached Jones-Washington and demanded that the disputed work be assigned to its members, notwithstanding the Section 10(k) award

to Weyerhaeuser's employees. As the administrative law judge noted, petitioner's business agent "admitted herein that one of the reasons Jones[-Washington] had been asked to live up to the [arbitration] award was because [petitioner] wanted the work in dispute. Thus, [petitioner's] claim that it does not seek assignment of the work covered by the 10(k) award has a hollow ring" (Pet. App. A32 (footnote omitted)).[5]

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[5] There is no substance to petitioner's assertion (Pet. 14-15) that its demand was not in derogation of the Section 10(k) award because it was not directly made to Weyerhaeuser. Petitioner knew that the stevedoring companies had no right to control the work at issue. In order to avoid the time-in-lieu payments, the stevedoring companies would be required to pressure Weyerhauser to reassign the disputed work to petitioner in violation of the Section 10(k) award. Plainly, petitioner did not expect the end result would be that the stevedoring companies would permanently cease doing business with Weyerhaeuser; that course would be irrationally self-defeating for petitioner. Instead, petitioner sought to force the stevedoring companies to pressure Weyerhaeuser to change its work assignment practices. Such secondary pressure by the union has consistently been held violative of Section 8(b)(4)(ii)(D). See *Millwrights Union Local 102*, 260 N.L.R.B. 972, 974 (1982); *Brotherhood of Teamsters Local 85*, 224 N.L.R.B. 801, 808 (1976). See also *NLRB* v. *Enterprise Ass'n of Pipefitters Local 638*, 429 U.S. 507, 515-519 (1977) (existence of a work assignment agreement with an employer does not legalize unlawful pressure directed at that employer designed to obtain work controlled by another employer). Petitioner's suggestion (Pet. 15 n.7) that only pressure exerted directly on the employer involved in the Section 10(k) process can be in derogation of a Section 10(k) award is erroneous. See *NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297, 305-306 (1971).

Petitioner's reliance (Pet. 13-14) on *Associated General Contractors of America, Inc.* v. *International Union of Operating Engineers, Local 701*, 529 F.2d 1395 (9th Cir.), cert. denied, 429 U.S. 822 (1976), is also misplaced. There, Local 701's con-

b. Petitioner further contends (Pet. 6-12) that, even if its Section 301 suit were in derogation of the Section 10(k) award, it cannot be the basis for an unfair labor practice under Section 8(b)(4)(ii)(D) because " 'judicial action' is not the kind of conduct which triggers the Board's jurisdiction" under that Section (Pet. 6). This contention is also mistaken.

As petitioner concedes (Pet. 8-10), this Court has held that a lawsuit, otherwise permissible under state or federal law, may be found to be unlawfully coercive where it has no reasonable basis in fact or law

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tract with Associated General Contractors (AGC) specified that AGC members could only subcontract to other AGC members and that all such members must assign certain work to employees represented by Local 701. An AGC member violated the agreement by subcontracting to an employer that was a member of the Northwest Association, whose members were contractually obligated to assign their work to employees represented by the Teamsters. Local 701 obtained an arbitration ruling that the collective bargaining agreement required the AGC member to use AGC subcontractors who would in turn use Local 701 labor. Meanwhile, the Northwest Association subcontractor received a Section 10(k) determination that the Teamsters were entitled to that subcontractor's work. The court found that there was no conflict between these decisions, noting that if AGC members complied with their contractual obligation to employ AGC subcontractors, both decisions could be respected. 529 F.2d at 1398. Here, by contrast, the stevedoring companies have no control over Weyerhaeuser and no power to assign the disputed work to petitioner's members in a way that would be consistent with the Board's Section 10(k) award. See Pet. App. A8. In all events, even if the cases were similar—and the court below found that they were not—the existence of an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

and is motivated by an intent to retaliate for the exercise of rights protected by the Act. *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983). Petitioner's Section 301 suit has no basis in law or fact because, under *Carey* v. *Westinghouse*, *supra*, the arbitration award on which it is based must fail in the face of a contrary Section 10(k) determination. And, petitioner's suit is improperly motivated because it constituted an economic tactic designed to obtain the work that the Board has awarded to the AWPPW-represented employees.

Petitioner contends (Pet. 6-12), however, that *Bill Johnson's* has no application here because the case law under Section 8(b)(4)(ii) indicates that judicial action was not intended to be interdicted under that provision.[6] Petitioner relies (Pet. 7-8) on cases involving contract clauses alleged to violate the provisions of Section 8(e) of the Act, 29 U.S.C. 158(e), barring certain secondary boycott or "hot cargo" agreements. Three of the cases cited, however, involve contract clauses expressly protected under the "construction industry" proviso to Section 8(e), and the legislative history of the proviso makes clear that Congress contemplated that such clauses properly could be enforced by judicial means. See *Local Union No. 45, Sheet Metal Workers* v. *Hardy*, 332 F.2d 682, 686-687 (5th Cir. 1964) (summarizing legislative history); see also *Mishara Construction Co.* v. *IBEW, Local Union No. 284*, 554 F.2d 488, 492 (1st Cir. 1977); *Local 644, United Brotherhood of Carpenters*

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[6] *Bill Johnson's* involved Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157."

v. *NLRB*, 533 F.2d 1136, 1145 (D.C. Cir. 1975).[7] And, although in the remaining cases cited by petitioner the courts ultimately may have found that the contract clauses were unenforceable under Section 8(e), those lawsuits were not of themselves unfair labor practices under *Bill Johnson's* because at the time the parties brought the suits there had been no definitive determination of the legality of the clauses by the Board, and the suits therefore constituted colorable contract claims brought in a good faith attempt to enforce the contracts. The situation is much different when the party bringing the coercive lawsuit was also a party to a prior proceeding that finally and definitively adjudicated certain rights, and the only purpose of the current lawsuit is to thwart the exercise of those rights.

Contrary to petitioner's contention, there is no indication of a congressional intent to exclude suits to enforce arbitration decisions that are in direct conflict with a Board Section 10(k) award from Section 8(b)(4)(ii)'s broad proscription of union coercion or restraint of an employer. Instead, there is good reason for interpreting that proscription to encompass such suits, for they can only result in forcing the employer to take action that is contrary to a Board determination that the Act contemplates shall be the final resolution of the matter.[8] Any other result

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[7] The only legislative history concerning the permissibility of lawsuits under Section 8(b)(4)(ii) upon which petitioner relies (Pet. 12 & n.5) deals with the construction industry proviso of Section 8(e).

[8] As the court below noted in discussing the cases cited by petitioner (Pet. App. A11):

> In none of these cases * * * would the enforcement of the union's contract in court have resulted in a conflict

would undermine Section 10(k)'s purpose of finally and definitively resolving jurisdictional disputes and fostering labor peace. See *Radio Engineers Union Local 1212*, 364 U.S. at 576-577.

3. Regardless of whether petitioner's Section 301 suit to enforce its arbitration award was a violation of Section 8(b)(4)(ii)(D) of the Act, that suit was properly dismissed by the district court. The arbitration award was inconsistent with the Board's Section 10(k) decision, and, therefore, the Board's ruling "would, of course, take precedence." *Carey* v. *Westinghouse*, 375 U.S. at 272.[9] When the Board makes a Section 10(k) determination, the controversy is removed "from the field of private contractual rights into the higher ambit of public rights." *New Orleans Typographical Union No. 17* v. *NLRB*, 368 F.2d 755, 767 (5th Cir. 1966).

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with an existing section 10(k) Board determination. Thus, these decisions were never required to resolve the conflict between the policy of encouraging dispute resolution through the courts and the countervailing labor policy considerations of the supremacy doctrine.

[9] Petitioner does not dispute that the district court would be obliged to dismiss its Section 301 suit if the arbitration award were in direct conflict with the Board's Section 10(k) determination. Its argument for district court jurisdiction rests on the erroneous premise that there is no conflict between the two determinations. See Pet. 12-15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board

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No. 85-1486

In the Supreme Court

of the United States

OCTOBER TERM 1985

LOCAL 32, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
Petitioner,

vs.

PACIFIC MARITIME ASSOCIATION, CRESCENT CITY MARINE WAYS AND DRYDOCK COMPANY, INC., AND NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CRESCENT CITY MARINE WAYS AND DRYDOCK COMPANY, INC. IN OPPOSITION

DEAN T. ZOGRAFOS
Counsel of Record
WILLIAMS & ZOGRAFOS, P.C.
1850 One Main Place
101 S.W. Main
Portland, OR 97204
(503) 224-2388
Counsel for Respondent
Crescent City Marine Ways
and Drydock Co., Inc.

STEVENS-NESS LAW PUBLISHING CO., PORTLAND, OR. 97204 865

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit properly affirmed the United States District Court for the Western District of Washington's decision not to enforce Arbitrator Kagel's award of contract damages to members of the International Longshoremen's and Warehousemen's Union, Local 32, for Crescent City Marine Ways and Drydock Company, Inc.'s failure to assign them certain work, where a prior NLRB Section 10(K) determination awarded the disputed work to employees represented by a different union.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 773 F.2d 1012 (1985) and is reproduced in Appendix A of petitioner's brief. The Order of the Court of Appeals denying rehearing is reproduced in Appendix B of petitioner's brief. The unreported Order of the District Court is reproduced in Appendix C of petitioner's brief. The Decision and Order of the National Labor Relations Board is reported at 271 NLRB No. 123 and is reproduced in Appendix D of petitioner's brief. The Decision and Determination of Dispute of the National Labor Relations Board is reported at 256 NLRB No. 24 and is reproduced in Appendix E of petitioner's brief.

JURISDICTION

This Court has jurisdiction pursuant to §1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

This case involves the application of Sections 8(b)(4)(ii)(D) and 10(K) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. §158(b)(4)(ii)(D) and §160(K), and Section 301(a) of the Labor Management Relations Act ("the LMRA"), 29 U.S.C. §185(a). The foregoing statutory provisions are reproduced in Appendix F of petitioner's brief.

STATEMENT OF THE CASE

I. HISTORICAL PERSPECTIVE

Since 1902, Weyerhaeuser Company ("Weyerhaeuser") has owned and operated a dock in Everett, Washington. The

dock, which sits adjacent to Weyerhaeuser's Thermo-Mechanical wood pulp mill ("T-M Mill"), has traditionally been used to facilitate loading products of both Weyerhaeuser and other manufacturers aboard ships for transportation to distant ports. The work at the dock has always consisted of tying up and casting off ships; transporting cargo from warehouse to shipside; hooking cargo onto the gear of the ships; and loading cargo aboard the vessels. Weyerhaeuser employees, represented by Local 20, Association of Western Pulp and Paper Workers ("Local 20"), have historically been responsible for tying up and casting off ships, and transporting cargo from warehouse to shipside. The remaining dock work has always been performed by employees of local stevedoring companies such as Crescent City Marine Ways and Drydock

Company, Inc. ("Crescent City").

The Pacific Maritime Association ("PMA") is an employer association comprised of numerous stevedoring companies, including Crescent City. At all times material to this dispute, PMA was a party to a collective bargaining agreement with Local 32, International Longshoremen's and Warehousemen's Union ("Local 32"). The agreement, commonly referred to as the "Pacific Coast Longshore Contract Document" ("PCLCD"), required that signatory stevedoring companies employ members of Local 32 to carry out longshore tasks. At all times material to this dispute, Weyerhaeuser, which has never been a member of PMA nor a signatory to the PCLCD, maintained an agreement with Crescent City to load cargo onto vessels from shipside at the Everett, Washington dock.

Sometime in late 1980, Weyerhaeuser closed its T-M Mill. The dock's operations, however, continued just as they had prior to the closure. Weyerhaeuser employees (members of Local 20) were still responsible for tying up and casting off ships, and moving cargo from warehouse to shipside.[1] Crescent City employees (members of Local 32) continued to attach the shipside cargo to the vessels' gear and load it aboard ship just as they had done for years prior to the closure.

On December 21, 1980, following the closure of the T-M Mill, the stevedoring employees (members of Local 32), claiming that its contract with PMA required Weyerhaeuser to assign them the work historically performed by Local 20

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[1]Upon the closing of the T-M Mill, Weyerhaeuser employees, who had been represented by Local 20, affiliated with Local 10 of the same union.

workers, engaged in a 45 minute work stoppage at the Everett, Washington dock.[2] Shortly thereafter, Weyerhaeuser filed an Unfair Labor Practice charge with the National Labor Relations Board ("Board"). The complaint alleged Local 32 violated §8(b)(4)(ii)(D) of the Act by engaging in a work stoppage with the sole purpose of forcing Weyerhaeuser to assign its members the work in dispute. Pursuant to §10(K) of the Act, 29 U.S.C. 160(K), the Board conducted a hearing on the matter.[3]

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[2]It is Local 32's contention that upon closing the T-M Mill at the Everett dock, said dock ceased to be an "industrial dock" and became a "commercial dock." The union asserts that pursuant to its agreement with PMA, its members should now be entitled to perform the work in dispute.

[3]The hearing was held before the Board on January 19, 1981. All parties were present and afforded a fair opportunity to present their claims and defenses.

II. BOARD DETERMINATION

On May 27, 1981, the Board issued its Decision and Determination of Dispute (reproduced in Appendix E of petitioner's brief). The Board awarded the disputed work to Weyerhaeuser's employees (Local 10 members). Id. The Board's decision was based upon:

1. The expressed preference of the employer;

2. The relative skills of both unions;

3. The long standing history of assigning the disputed work to Local 10 members; and

4. The fact that the contract between Local 32 and PMA gave deference to existing work assignments. Id. at pages A-50-55.

After Local 32 agreed to comply with its determination, the Board dismissed the Unfair Labor Practice charges. Id.

III. ARBITRATION PROCEEDING

Pursuant to its collective bargaining agreement with Crescent City, Local 32 presented its claim in arbitration.[4] This proceeding was commenced concurrently with the Board action.

Four months after the Board's determination, Arbitrator Sam Kagel issued his decision. Contrary to the Board's decision, he concluded the work in dispute should have been assigned to Local 32 members following the closing of Weyerhaeuser's T-M Mill. Moreover, he awarded Local 32 members "time-in-lieu" payments to remedy the wrongful work assignment.

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[4]Local 32 and Crescent City were the only parties present at this proceeding. Weyerhaeuser and Local 10 were not parties to the subject collective bargaining agreement. Therefore, they were not given an opportunity to be heard.

IV. DISTRICT COURT PROCEEDING

Following Arbitrator Kagel's determination, in breach of its agreement to abide by the Board's determination, Local 32 sought enforcement of the arbitration award. It filed "payment-in-lieu" grievance claims and commenced suit under §301(a) of the LMRA, 29 U.S.C. §185(a), to enforce the arbitration award. Contrary to Local 32's position, however, the court found Arbitrator Kagel's award to be in direct conflict with the Board's prior determination. The U.S. District Court for the Western District of Washington ("District Court") refused to enforce the arbitration award.

V. SUBSEQUENT BOARD DETERMINATION

In response to Local 32's §301 suit to enforce the conflicting arbitration award, the Board reinstated the Unfair Labor Practice charges. It also

determined that by filing the "payment-in-lieu" claims and the §301 suit, Local 32 had failed to comply with the Board's §10(K) determination and violated §8(b)(4)(ii)(D) of the Act.

VI. COURT OF APPEALS

Thereafter, Local 32 filed a petition before the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") for review of the Board's Unfair Labor Practice claim and the District Court's refusal to enforce the arbitration award. The Board cross-applied for enforcement of its Unfair Labor Practice claim.

The Court of Appeals affirmed the District Court's decision and held that the Board's §10(K) work assignment determination precluded enforcement of Sam Kagel's subsequent conflicting arbitration award. 773 F.2d 1012 (1985) (reproduced in Appendix A of

petitioner's brief). The Court also enforced the Board's §10(K) determination and its holding that Local 32's attempt to seek enforcement of a contrary subsequent arbitration award constituted a violation of §8(b)(4)(ii)(D) of the Act. Id.

Local 32 has filed a petition for writ of certiorari. Respondent Crescent City will only address the issue whether the Court of Appeals erred by deciding that a prior Board §10(K) work assignment determination took precedence over a subsequent conflicting arbitration award.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

This Court grants review on writ of certiorari only when there exists "special and important reasons." Sup. Ct. R. 17.1. The instant case, however,

does not present the requisite circumstances for the Court to grant review. The Ninth Circuit's interpretation of the federal laws applicable to this case was proper. Moreover, there is no conflict between the Ninth Circuit's holding and that of the other circuits. Therefore, petitioner's request for writ of certiorari should be denied.

I. THE SUPREMACY DOCTRINE BARS THE COURT FROM ENFORGING AN ARBITER'S AWARD WHICH IS INCONSISTENT WITH A PRIOR §10(K) BOARD DETERMINATION.

Pursuant to §10(K) of the Act, the Board is required to "hear and determine" labor jurisdictional disputes when either union involved has been charged with an Unfair Labor Practice under §8(b)(4)(D) of the Act. 29 U.S.C. §160(K). Though the guidance of this Court, it has become well established that a prior Board §10(K) determination

will take precedence over a subsequent inconsistent arbitration award.[5] In order to promote uniformity of the resolution of these types of labor disputes, the judiciary consistently defers to the wisdom of the Board. Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964); Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 269 (1974); See also, Local Joint Executive Board v. Royal Center, Inc., 754 F.2d 835 (9th Cir. 1985); Carpenters Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1278 (9th Cir. 1984).

In Carey, this Court was asked to consider the appropriateness of arbitration as an alternative forum for settling work assignment disputes.

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[5]This rule is commonly referred to as the "Supremacy Doctrine."

Although it was concluded that arbitration is an appropriate alternative when no economic action or charges of §8(b)(4)(D) conduct exists, this Court did emphasize that "[t]he superior authority of the Board may be invoked at any time." 375 U.S. at 272. Moreover, the Court clearly announced that when the Board acts to resolve a work assignment dispute, its determination shall take precedence over and preclude enforcement of a contrary arbitration award. This rule holds true whether the arbitration remedy is an actual award of the disputed work or an award of damages. In fact, Justice Douglas, writing the opinion for the Court, stated:

> "Should the Board disagree with the arbiter...the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with the ruling, it would not be liable for damages under Section 301."

In the instant case, Weyerhaeuser filed an Unfair Labor Practice charge against Local 32, alleging that the union violated §8(b)(4)(D) of the Act by engaging in activity with an objective of forcing or requiring Weyerhaeuser to assign the work of handling vessel lines and moving cargo from warehouse to shipside to its members rather than members of Local 10. On January 19, 1981, the Board held a §10(K) hearing on the matter. All parties appeared and were afforded full opportunity to present their respective claims. After reviewing the evidence introduced, the collective bargaining agreement involved, the industry practices, the relative skills of the employees involved, the economy of the operations, and the employer's preference, the Board concluded Local 10 was entitled to perform the work in dispute.

Approximately four months after the Board made the foregoing determination, Arbitrator Sam Kagel issued his opinion and decision.[6] He concluded the work in dispute should have been assigned to Local 32 members. On the issue of damages, he held Local 32 members were entitled to "time-in-lieu" payments.

The Board's determination and Arbitrator Kagel's award are mutually exclusive. There exists no means to conceptualize consistency between the two decisions. Therefore, pursuant to the well established rule that the Board's prior §10(K) determination takes precedence over a subsequent inconsistent arbitration award, the Court of Appeals' decision to enforce

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[6]The arbitration proceeding involved PMA and Local 32.

the Board's determination was proper. The law is clear. No grounds exist for the United States Supreme Court to review this issue.

II. PETITIONER'S ARGUMENT THAT THE BOARD'S DECISION AND ARBITRATOR KAGEL'S AWARD ARE CONSISTENT IS WITHOUT MERIT.

In an attempt to circumvent the "Supremacy Doctrine" and create the illusion that no inconsistency exists between the decisions of the Board and Arbitrator Kagel, petitioner asserts that the Ninth Circuit Court of Appeals' decision in Associated General Contractors of America, Inc. v. I.U.O.E., Inc. Local 701, 529 F.2d 1395 (9th Cir.) cert. den. 429 U.S. 822 (1976) ("AGC") and this Court's holding in W.R. Grace and Company v. Local Union 759, 461 U.S. 757 (1983) ("W.R. Grace")

are controlling in this case. An analysis of the facts of the instant case and those presented in AGC and W.R. Grace, however, removes the illusion of congruity and it becomes vivid, as stated by the lower Court (which heard both the instant and AGC cases), these cases are distinguishable. (See page A-7 of petitioner's brief).

In the instant case, Arbitrator Kagel awarded the disputed work to Local 32. On the issue of damages, he ordered Crescent City to compensate Local 32 members for what he determined was a breach of its collective bargaining agreement with the union. Arbitrator Kagel's award is completely contrary to the Board determination that Local 10 was entitled to the disputed work. The Board's determination does not recognize that respondent breached its agreement with Local 32. Therefore, any

arbitration award of damages for said breach would be in direct conflict with the Board's prior decision. Moreover, the Board's determination that Local 10 was properly entitled to the disputed work assignment is irreconcilable with Arbitrator Kagel's conclusion that Local 32 is entitled to the disputed work. Thus there exists no means to conceptualize any type of symmetry between these two decisions.

In light of the foregoing, petitioner still argues the two decisions are consistent. Local 32 contends that the Board's §10(k) determination only affirmatively requires that Local 10 members (Weyerhaeuser employees) be assigned the disputed work. It does not require PMA and its members (e.g. Crescent City) to act or refrain from acting in any manner. Therefore, as petitioner asserts, PMA and its members

are free to refuse to contract with Weyerhaeuser. If they did not do business with Weyerhaeuser, Local 32 contends neither PMA nor its signatories would be part of an arrangement where the disputed work would be assigned to Local 10 in violation of its agreement with Local 32. Local 32 goes on to conclude that by refraining from contracting with Weyerhaeuser, PMA and its members could comply with both Arbitrator Kagel's decision and the Board's determination. It is petitioners conclusion that PMA and its members can fulfill their obligations to Local 32 without violating the Board's §10(K) termination. Thus, it is the Union's position that the decisions of Arbitrator Kagel and the Board are truly consistent. To support its position, petitioner relies on AGC and W.R. Grace.

A. THE HOLDING IN AGC IS INAPPLICABLE TO THE INSTANT CASE.

AGC involved the following facts: Western-Pacific Piledriving Corporation ("Western Pacific") was an employer member of the Associated General Contractors ("AGC") and a party to AGC's collective bargaining agreement with the IUOE. The AGC-IUOE agreement contained a provision prohibiting subcontracting of concrete pumping work to a non-signatory employer. Notwithstanding that agreement, Western-Pacific subcontracted concrete pumping work at one construction site to a second employer, which had a collective bargaining agreement with the Teamsters. Pursuant to its Teamsters' contract, the subcontractor assigned the pumping work to a Teamster member employee. IUOE, through its contract grievance procedure,

asserted that the AGC member, Western-Pacific, was required to assign the work to a member of IUOE. As a result of the work assignment dispute, the Board conducted a hearing on the matter. In its §10(K) determination, the Board concluded the concrete pumping work was properly assigned to Teamster member employees whenever an AGC member contracted that work to a Teamster subcontractor. Id. at 1396.

The Court of Appeals in AGC expressly recognized that once a Board §10(K) determination issues, "no court [may] be permitted to impair compliance with it." Id. at 1397. However, the Court noted that in some cases it is possible that the granting of contractual damages may not conflict with the Board's §10(K) decision. Id. at 1398-99. The Court found that Western-Pacific and other AGC members

could have complied with their IUOE agreement and assigned the disputed work to IUOE employees or an IUOE subcontractor without violating the Board's §10(K) award. This conclusion was possible solely because the Board's §10(K) award in favor of the Teamsters was limited by its own terms to work sites where the pumping work was subcontracted to an employer which was a party to a Teamster collective bargaining agreement.[7] Id. at 1389. Thus, as long as AGC members complied with their collective bargaining agreement and assigned the pumping work to an IUOE employee or IUOE subcontractor, the Board's §10(K) determination would not be applicable.

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[7]The Board determination by its terms only applied "whenever" the employer contracted the disputed work to a Teamster subcontractor. The Board made no unconditional work assignment ruling.

As expressly noted by the lower court, the instant case is distinguishable from AGC on two grounds.

1. THE BOARD'S §10(K) DETERMINATION IS UNCONDITIONAL.

In our case, there are no limitations or conditions on the Board's §10(K) award. The Board simply ordered that "Employees of Weyerhaeuser Company, who are represented by Association of Western Pulp and Paper Workers, Local 10, are entitled to perform the work of the handling of cargo from the warehouse or last point of rest to shipside and the tying up and casting off lines of vessels at the Employer's dock in Everett, Washington." (See Appendix E of petitioner's brief at page A-54). It was therefore impossible for Weyerhaeuser or any PMA employer to comply with the Local 32 contract and assign the disputed work to a member of

Local 32 without violating the Board's §10(K) determination. In direct contrast, however, the employer in AGC could comply with the arbitration award without violating the Board's §10(K) determination by simply assigning the disputed work to IUOE members.

2. CRESCENT CITY HAS NO CONTROL OF WEYERHAEUSER'S WORK ASSIGNMENTS.

In our case, PMA and its signatories (e.g. Crescent City) have no control over Weyerhaeuser's assignment of work. Weyerhaeuser is the primary employer and had complete control over the assignment of the disputed work. Thus, any breach which occurred in the instant case cannot be characterized as "voluntary" on the part of PMA or its signatories. In AGC, on the other hand, the party who owed the contractual duty to the union was also the primary

employer and had complete control over the work assignment at issue. Therefore, they could control whether the arbitration award was breached. Thus, if it breached the agreement, said breach was "voluntary." In contrast, as already stated, in our case, neither Crescent City nor other PMA signatories can compel Weyerhaeuser to assign the disputed work to either themselves or Local 32 members. Weyerhaeuser is the primary employer and it has no contractual relationship with Local 32.

Even in light of the foregoing significant distinguishing factors, Local 32 contends that Crescent City could have complied with its collective bargaining agreement without violating the Board's §10(K) determination. Local 32 suggests that Crescent City could have complied by refusing to provide stevedoring services at the Everett dock

for Weyerhaeuser and other employers not signatory to a Local 32 contract. In order to support this argument, petitioner refers to the facts of AGC. As already noted, in that case, if AGC member, Western-Pacific, had ceased subcontracting to non-IUOE employers, it would have retained control over the concrete pumping work which it could then have assigned to members of IUOE in accordance with its collective bargaining agreement without violating the Board's §10(K) determination. In our case, however, as already noted, the only work on the Everett dock allotted to PMA members such as Crescent City was the taking of goods from ship side and loading them onto the vessels. The disputed work of moving goods from storage to shipside and tying up vessels was retained and assigned by Weyerhaeuser to Weyerhaeuser employees

represented by Local 10. Clearly, if Crescent City, at Local 32's urging, had refused to perform the loading work traditionally contracted to PMA members, such action would not have brought Crescent City into compliance with its contractual duty of assigning the disputed work to Local 32 members. Rather, it would have eliminated the only work available to PMA members on the Everett dock; left Crescent City liable for time-in-lieu claims for the disputed work assigned by Weyerhaeuser to its employees; and invited additional unfair labor practice charges against Local 32 for violation of

§8(b)(4)(ii)(B) of the Act. 29 U.S.C. §158(b)(4)(ii)(B).[8]

Based upon the foregoing, it is clear that the facts of AGC are distinguishable from the facts in the

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[8] §8(b)(4)(ii)(B) of the Act provides:

> "It shall be an unfair labor practice for a labor organization or its agents-...to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:...
>
> (B) forcing, or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

instant case and the holding is therefore inapplicable. In contrast with AGC, in our case the Board's §10(K) determination is unconditional. Moreover, the primary employer in our case (Crescent City), unlike the situation presented in AGC, has no control over the disputed work assignment.[9]

B. THE HOLDING IN W.R. GRACE IS INAPPLICABLE TO THE INSTANT CASE.

To further support its contention that Arbitrator Kagel's award of damages was proper and should be enforced, petitioner relies on the case of W.R. Grace and Co. v. Local Union 759, 461 U.S. 757 (1983). In that case, this

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[9]The Court of Appeals, in its extensive opinion, outlined these facts and concluded the instant case was clearly distinguishable from AGC. (See Appendix A of Petitioner's brief at page A-7).

Court was presented with a dispute arising out of the union's attempt to hold the employer liable for failing to retain certain employees in specific job positions. The Federal District court found public policy prevented enforcement of an arbitrator's award construing a collective bargaining agreement against the employer who was acting pursuant to an agreement with the Equal Employment Opportunity Commission ("EEOC"). While the Company, by removing a certain group of employees from their job classifications, was complying with its EEOC obligation, it also simultaneously breaching the collective bargaining agreement with the union. The union asserted that since the decision to withdraw the employees from their particular job responsibilities was totally within the company's control, it should be liable for

all damages arising therefrom.

This court noted the issue was one of control. Unlike the predicament of PMA and Crescent City in the instant case, this Court observed in W.R. Grace that the "dilemma ...was the company's own making. The company had committed itself voluntarily to two conflicting contractual obligations." Id. at 767. Therefore, breaches arising from non-compliance were left sitting on the employer's lap. It was held that the arbitrator's award was proper. Id. at 772.

As stated above, neither PMA nor Crescent City had any control over the assignment of the disputed work in the instant case. All control remained with Weyerhaeuser, the primary employer. Therefore, neither PMA nor Crescent City should have to sleep in a bed they did not make. W.R. Grace is inapplicable to

the instant case.

CONCLUSION

Arbitrator Kagel's award is clearly inconsistent with the Board's prior §10(K) determination. In accordance with the "Supremacy Doctrine," the Board's decision must take precedence over Arbitrator Kagel's inconsistent determination. Since this Court's decision in W.R. Grace and the Ninth Circuit Court of Appeals' decision in AGC are not controlling in this case, it is clear the Court of Appeals did not err when it concluded the Board's determination must take precedence over the subsequent inconsistent arbitration award. Therefore, no grounds exist for the Court to grant Local 32's petition for writ of certiorari with respect to

the enforcement of Arbitrator Kagel's award.

Respectfully submitted,

WILLIAMS & ZOGRAFOS, P.C.

By: _____

DEAN T. ZOGRAFOS
1850 One Main Place
101 S.W. Main
Portland, Oregon 97204
Counsel for Respondent
Crescent City Marine Ways
& Drydock Company, Inc.